Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1995

SALVATORE MORETTI,
Petitioner
v.
CITIBANK, N.A., CITIBANK, BRANCH NO. 11, MARY WING, AND JOHN DOE, et al.,
Defendants-Respondents

ON PETITION FOR WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Salvatore Moretti
Pro-Se Petitioner
390 Park Street
Hackensack, New Jersey 07601
(201) 646-1414

November 13, 1995

QUESTIONS PRESENTED FOR REVIEW

1. Did the federal trial court in the Eastern District of the United States District Court of New York abuse its discretion in denying the order to show cause to compel Citibank to reveal the names of the defendants involved in the August 8, 1994 robbery (and the prior robberies at Citibank Branch No. 11), and did it abuse its discretion in transferrng the case to the Southern District of New York without a hearing on the merits.

2. Did the Southern District of the United States District Court of New York abuse its discretion by refusing to demand that Citibank answer the summons it prepared for Citibank to answer, by refusing to demand that Citibank respond to a subpoena to turn over the film of the robbery the bank made on August 8, 1994, and in refusing to conduct a hearing on the merits on the dismissal of the original complaint filed August 19, 1994, eleven days after the robbery.

3. Did the Southern District of the United States District Court of New York abuse its discretion by refusing to vacate the dismissal of the complaint due to the existence of a private right of action under the facts within, or due to the producing of an amended complaint sounding in violation of the federal RICO statute filed by petitioner at the motion for re-hearing on December 8, 1994.

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JUDGMENTS SOUGHT TO BE REVIEWED

Judgment by the United States Court of Appeals for the Second Circuit, Circuit Judges Caramone, Miner, and Calabresi, in the case of Salvatore Moretti v. Citibank, et al., 95-7060, opinion rendered September 1, 1995 (App. 1). This judgment upheld the order by Judge Robert Patterson on the United States District Court, Southern District, rendered on October 31, 1994 dismissing the complaint, 94-6892 (App. 6), and also upheld Judge Patterson's denial of amendment of the complaint to include violation of the RICO statute by Citibank on December 12, 1994, 94-6892 (App. 8).

JURISDICTION

Jurisdiction is sought pursuant to 28 U. S. C. Section 1254(1) which provides that the Supreme Court may review cases in the federal court of appeals by writ of certiorari, whether in civil or criminal cases. There are no limitations as to the parties, or the amount in controversy.

STATEMENT OF THE CASE

On August 8, 1994, petitioner Moretti was assaulted by a thief (John Doe, in the complaint), in the Citibank Branch No. 11, as part of a bank robbery in which Moretti was robbed of over $7,000 (App. 45). The robbery was well rehearsed (App. 46) in that men had been throwing money on the floor next to the petitioner and seeking to rob Moretti's deposit (the petitioner having deposited $145,000 in the bank over the prior year), and several prior thefts had occurred relieving Moretti of

over $1,400.

After failing to receive the cooperation of Citibank, and the investigating authorities, Moretti filed complaint in the Eastern District of the United States District Court of New York within eleven days of the robbery (App. 15), on August 19, 1994. Moretti sought to discover the names of the defendants, and to determine the nature of the cause of action by filing and serving the complaint by order to show cause (App. 12), but the Eastern District of the United States District Court of New York denied the order to show cause, and in fact transferred (App. 11) the entire action over to the Southern District Court ofthe United States District Court of New York, which is within a half mile of the scene of the crime.

While still in the Eastern District, Citibank filed a motion to dismiss there, and then filed a second motion to dismiss in the Southern District before petitioner had an opportunity to be heard on the transfer. Judge Patterson of the Southern District dismissed the case (App. 8), the clerk of the court closed the case forthwith (App. 10), and the judge then denied amending the case (App. 6) although the amendment came prior to the answering of the complaint by Citibank; the motion to amend was filed within hours of the deputy clerk's closing of the case (App. 10). Petitioner alleges the case was closed prematurely, and without a hearing of the merits.

Although Citibnak admitted through its bank manager that a theft occurred at its bank branch on Broadway in lower Manhattan (App. 34), it denied access to the film record of the robbery, first insisting that the police accompany Moretti and then claiming the cameras were not functioning. Then they refused to honor a subpoena

demanding that the film of the robbery be turned over.

The Court of Appeals affirmed the decisions below by opinion dated September 1, 1995 (App. 1), resulting in Petitioner filing this Petition for Certiorari.

POINT ONE

THE EASTERN DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE ORDER TO SHOW CAUSE WHICH SERVED THE COMPLAINT AND IN TRANSFERRING TO THE SOUTHERN DISTRICT.

On August 19, 1994, petitioner sought discovery through an order to show cause in order to reveal "the branch affiliations which should be made party defendant" to his complaint, Moretti v. Citibank, et al., 94-3944, filed in the Eastern District of New Jesey. Service by order to show cause would bring the defendant to the court so as to accept the complaint on October 19, 1994. Judge Sterling Johnson denied the Order to Show cause on October 19, 1994 (App. 12). Twelve days later the case was transferred (App. 11) by order of Judge Amon.

As petitioner explained in his certification of October 13, 1994, 28 U.S.C. Section 1391(a) provides a corporation "resides in any district in a State" in which there are "more than one judicial districts." Hence, the case should not have been transferred one mile from the Eastern District to the Southern District Court at Foley Square. Petitioner listed thirty-two Citibank Branches in Brooklyn (App. 30-31), proving significant contacts with the

federal district court in the Southern District of New York.

The August 31, 1994 order "waives" a five day delay provided by Rule 26 of the Local Rules, and thereby by passed scheduling a hearng and time to object to the transfer.

Clearly, the complaint was never answered; Citibank resisted service by filing a motion to dismiss which arrived in the Eastern District after the case was transferred to the Southern District. Even before that, the bank refused to show the film of the robbery, claimed a police escort was required, delayed until it alleged there was no film of the robbery, and then filed a subsequent motion to dismiss in the Southern District claiming insufficient money was stolen (federal jurisdiction requires $50,000 be involved) to suggest that the theft of less than $50,000 would produce consequential damages requiring jurisdiction, ignoring the $140,000 of deposits it admits receiving at the branch in one year.

POINT TWO

THE SOUTHERN DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO INSIST THAT CITIBANK ANSWER THE COMPLAINT FOR WHICH IT SUPPLIED SUMMONSES, IN FAILING TO COMPEL CITIBANK TO PRODUCE THE FILMS OF THE ROBBERY, AND IN DISMISSING THE ORIGINAL COMPLAINT WHOSE SERVICE

WAS MEANT TO PROVIDE A
LIST OF DEFENDANTS

Judge Patterson's October 31, 1994 order of dismissal is prefaced with a one paragraph memorandum which references the case of Sadlon v. Citibank, N.A. 947 F. 2d. 642 (2d Cir. 1991) twice. In the Sadlon case, plantiff pro se Sadlon sued Citibank for one billion dollars. The pro se complaint failed to set forth a clear cause of action producing so great a loss. Comparing Sadlon's complaint with petitioner's carefully worded complaint is unfair.

Judge Patterson opines that a film record showing a mele at 415 Broadway at Canal street, Citibank Branch No. 11 would not move a jury to perceive a crime in which over $50,000 was involved. Consider that this is but one of several robberies described in the complaint, consider that petitioner was punched in the back (App. 26) during the robbery, consider the precise description of the robber as white, heavy, male, exiting from the office of Mary Wing, a vice president of the bank. Consider that the bank alleges cameras three and four (pointed directly at the robbery) were inoperative (App. 18). Consider the consequential damage of not paying a $13,000 water bill (App. 43) petitioner owed on real estate, during the pendency of litigation petitoner had in the third circuit federal courts - litigation which passed the $50,000 jurisdictional hurrdle (App. 43). Consider the description of the preparatory acts to the robbery - throwing money on the ground on numerous occassions to divert petitioner's attention (App. 44). Did Judge Patterson rule prematurely? There is no doubt that he did.

POINT THREE

THE SOUTHERN DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO FILE THE AMENDED COMPLANT SOUNDING IN RICO. 28 U.S.C. SECTION 1961, ET SEQ.

On the return date of the motion to file an amended complaint, petitioner submitted his amended complaint (App. 39). Judge Patterson's memorandum decision (App. 6) on Dcember 12, 1994 stated that "the Court does not have authority to order the filing of an amended complaint once judgment has been entered." (App. 7)

Citibank cites the Twohy case (App. 153) in its favor, but admits that under Foman, (App. 154) "if the underlying facts or circumstances may be a proper subject of relief, a plaintiff "ought to be afforded an opportunity to test his claim on the merits," 371 U.S. 178, 182 (1962) (App. 154). In fact, Rule 15 states " party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." (App. 131) Here, Citibank never answered the complaint. The amendment related back to the orignial complaint, it arose out of the original pleading. (App. 132). A smooth get away required rehearsal in a busy bank branch (App. 133) particularly in the small space occupied by Branch No. 11. This amendment is in a proper case.

CONCLUSION

Petitioner prays for the reversal of the dismissal of his complaint for the reasons set forth within. Denying relief under the facts within would weaken the foundations of the banking system.

ORDER APPEALED FROM. SEPT. 1,
App. 1 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Suare, in the City of New York on the 1st day of September, one thousand nine hundred and ninety-five.

PRESENT:

HON. RICHARD J. CARAMONE,
HON. ROGER J. MINER,
HON. GUIDO CALACRESI,
Circuit Judges.

SALVATORE MORETTI,
Plaintiff-Apellant,
v. ORDER
CITIBANK, N.A., Branch No. 11, 95-7060
Defendant-Appellee.

UPON CONSIDERATION of this appeal from an order of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the order be and it hereby is AFFIRMED.

Plaintiff-appellant Salvatore Moretti appeals from an order of the United States District Court for the Southern District of New York (Patterson, J.) denying his motion to file an amended complaint and for recodsideration of the court's earlier decision to dismiss his complaint.

On August 22, 1994, Moretti filed a complaint against Citibank N.A. Brach No. 11 and John Doe. In his complaint, Moretti alleged tht he had been robbed of approximately $7,000 by John Doe [1] [1] By naming John Doe as a defendant, Moretti intended to include the alleged robber, whose identitiy he did not know, as a party to this action.] while standing in line to make a deposit at a Citibank branch in lower Manhattan. Moretti demanded approximately $17,000 in damages resulting from Citibank's negligence. In late September, the case was transferred from the Eastern to the Southern District because the Citibank branch named in the complaint was located in the Southern District.

On October 6, 1994, Citibank moved to dismiss Moretti's complaint for lack of subject matter jurisdiction. The bank noted that Moretti relied upon diversity of citizenship to establish subject matter jurisdiction, but the amount in controversy, according to Moretti's complaint, was for far less than $50,000. Moretti opposed this motion, contending that there had been a series of robberies at the bank beginning in early 1994 and the total amount stolen exceeed $50,000. In addition, Moretti argued that the district court had federal question jurisdiction under the Federal Bank Robbery Act ("FBRA"), 18 U.S.C. Section 2113, a criminal statute.

By endorsement dated November 1, 1994, the district court granted Citibank's motion to dismiss, concluding that the FBRA did not create a private right of action and that diversity jurisdiction was lacking because the amount in controversy is not in excess of $50,000. Judgement was entered on November 17, 1994, dismissing Moretti's complaint without prejudice to the refiling of Moretti's claims in state court.

On November 22, 1994, Moretti moved to file an amended complaint and to set aside the dismissal of his original complaint. Moretti's amended conplaint set forth one cause of action, an allegation that Citibank had violated the Racketeer Influenced and Corrupt Organization Act ("RICO"), 28 U.S. C. Section 1961 et seq. In his amended complaint, Moretti demanded $500,000 in damages, attorney's fees and costs, as well as consequential damages. The district court denied these motions, stating that nothing in Moretti's moving papers caused the court to reconsider its decision to dismiss the complaint or to vacate the resulting judgment. The court also noted that it did not have the authority to order the filng of an amended complaint once judment has been entered. This appeal followed.

Moretti makes the following contentions on appeal: (1) the district court erred in denying him leave to file an amended complaint; (2) the court had subject matter jurisdiction under the RICO statute; (3) the acts of Citibank constitute negligence per se; (4) Citibank is liable for violating statutes that criminalize bank robbery, embezzlement, assault, and battery; and (5) the case improperly was transferred from the Eastern to the Southern District. We reject each of these contentions.

At the outset, it is clear that the district court lacked subjct matter jurisdiction over Moretti's original complaint. The diversity statute, 28 U.S.C. Section 1332, requires that the amount in controversy exceed $50,000. Moretti's original complaint sought approximately $17,000, less than one-third of the required amount. In movng to set aside the district court's dismissal for lack of subject matter jurisdiction, Moretti filed a memorandum of law in which he contented that: (1) Citibank breached its fiduciary duty to him; (2) the district court

erred in finding no private right of action under the FBRA; (3) the bank's failure to acknowledge a prior $1,500 deposit "established a preparatory act to the physical act of [the] robbery itself:' and (4) federal-question jurisdiction was present by virtue of an action that Moretti had pending in the United States Supreme Court. We agree with the district court that nothing in Moretti's submission calls into question the correctness of dismissing the original complaint for lack of jurisdiction.

We reject Moretti's contention that the district court erred in refusing to allow the filing of an amended complaint. First, in order to allow Moretti to file an amended complaint, the district court would have had to set aside it prior judgment. See National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 244 (2d Cir. 1991). As noted above, Moretti's submission provided the district court with no sound reason to set aside its prior determination. Moreover, although the district court would have had subject matter jurisdiction over a civil RICO claim under 28 U.S. C. Section 1331, we believe that the amended complaint fails to adequately plead a cause of action under the RICO statute.

In particular, we note that the alleged predicate acts all arise out of the same tranaction or occurrence -- the robbery on August 8, 1994 of approximately $7,000. Accordingly, the complaint fails to allege the required RICO element of "continuity," i.e., that defendants' predicate acts extended over a substantial period of time or that defendants' conduct "projects into the future with a threat of repetition." H.J. Inc. v. Northwestern Bell. Tel. Co., 492 U.S. 229, 241-42 (1989). Under these circumstances, we conclude that the district court did not abuse its discretion in denying leave to

amend.

We have considered Moretti's remaining contentions and find them all to be without merit.

(s) Hon. Richard J. Cardamone,
Hon. Roger J. Miner,
Hon. Guido Calabresi,
Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

TRIAL COURT ORDER DENYING
REHEARING OF App. 6 DISMISSAL
12/12/94

SALVATORE MORETTI
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

November 22, 1994

United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brookln, New York 11201

Re: Summons & Complaint, Salvatore Moretti vs. Citibank N.A., Branch # 11, John Doe, et al., Motion to File Amended Complaint, Motion to Set Aside Dismissal, etc.
Eastern District Docket No. 94-3944 (CBA)[Amon]
Southern District Docket No. 94-6892 (RPP)[Patterson]

Dear Clerk of the Court:

Kindly file the enclosed motion papers pursuant to the within brief to set aside the order entered October 31, 1994, and to file an amended complaint.

Very truly, Salvatore Moretti, Pro Se

Moretti v. Citibank, 94 CV 6892 (RPP). MEMO ENDORSEMENT READS:

"Motion denied.

"Plaintiff appeared pro se on December 8, 1994. Nothing plaintiff said on that occasion or in plaintiff's motion papers is of a nature to cause the Court to reconsider its original decision to dismiss the complaint or to vacate the judgment herein pursuant to Rule 59(e) or 60 (b). The Court does not have authority to order the filing of an amended complaint once judgment has been entered. Accordingly the motion is denied.

"So ordered.

"Robert P. Patterson, Jr., U.S.D.J., 12/12/94."

MOTION TO DISMISS GRANTED
BY TRIAL COURT, 10/31/94
App. 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 94-6892 (RPP)

SALVATORE MORETTI,
Plaintiff

vs.

CITIBANK, N.A. BRANCH NO. 11,
JOHN DOE,
Defendants

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed Declaration of Joseph L. Buckley with attachments Memorandum of Law, and on all the pleadings in this action, defendant, Citibank, N.A. ("Citibank"), will move this Court before the Hon. Robert P. Patterson at the United States Courthouse, Foley Square, New York, New York 10007, Courtroom 302, on Friday, October 21, 1994, at 4:00 p.m., or as soon thereafter as counsel may be heard: (i) for an Order, pursuant to Fed. R. Civ. P. 12(b)(1), dismissing plaintiff's action for lack of jurisdiction over the subject matter; and (ii) for such other and further relief as the Court may deem just and proper.

Pursuant to Rule 3 of the Civil Rules of the Southern District of New York, plaintiff's oppostion papers shall be served at least seven (7) days before the return date of this ...

Moretti v. Citibank, 94 Civ. 6892 (RPP)
MEMO ENDORSEMENT READS:

"Motion granted. This Court does not have jurisdiction

over this claim. The Federal Bank Robbery Act, 18, U.S.C. 2113, does not create a federal private right of action either expressly or by implication, see Sadler v. Citibank, N.A., 947 F. 2d 642, 643 (2d Cir. 1991), but is designed to protect the Federal Reserve Bank System and its member banks from robbery, Way v. United States, 268 F.2d 785 (10th Cir. 1959); Sadler v. Citibank, N.A. at 644. Furthermore, plaintiff's claim is for less than $50,000 and no diversity exists. Nothing prevents plaintiff from bringing his action in the courts of new York State. So ordered.

"This action is dismissed and case closed.

"10/31/94 Robert P. Patterson, Jr., U.S.D.J."

ORDER CLOSING CASE, TRIAL COURT
11/17/94 App. 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SALVATORE MORETTI,
Plaintiff
- against -
CITIBANK, N.A. BRANCH NO. 11,
JOHN DOE,
Defendants

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94 CIVIL 6892 (RPP)
JUDGMENT

Defendant Citbank N.A. Branch No. 11 having moved, pursuant to F.R.Civ. P. 12(b)(1), to dismiss plaintiff's complaint for lack of jurisdiction over the subject matter, and the said motion having come before the Honorable ROBERT P. PATTERSON, U.S.D.J., and the Court thereafter on Nobember 1, 1994, having rendered its memorandum endorsement; granting the motion, and dismissing the action, and closing the case, it is,

ORDERED, ADJUDGED AND DECREED: That defendant Citibank, N.A. Branch no. 11's motion to dismiss to (sic) complaint be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed in its entirety, and it is further,

ORDERED, that the case be and it is hereby closed.

DATED: NEW YORK, NEW YORK
November 17, 1994
James M. Parkison, Clerk
By: Ronald A. Churel, Deputy Clerk

ORDER TRANSFERRING TO SOUTHERN DISTRICT,8/31/ App. 11 /94

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SALVATORE MORETTI,
Plaintiff
-against-
CITIBANK N.A. BRANCH 11,
JOHN DOE, et al.,
Defendants

TRANSFER ORDER - 94-CV-3944 (CBA)

AMON, J.

Plaintiff, pro se, brings this action pursuant to 28 U,.S. C. Section 1332 alleging inter alia, "grand larceny" of his bank account. Under 28 U.S.C. Section 1391, a civil action founded on diversity of citizenship may be brought only in "(1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." Since defendants Citibank N.A. Branch 11 is located at 415 Broadway, at Canal Street, which is located in the Southern District of New York, the action should be and hereby is transferred to the United States District Court for the Southern District of New York. 28 U.S.C. Sections 1391 (b), 1406(a).

That provision of Rule 26 of the Local Rules for the Eastern District of New York which requires a five day delay is waived.

SO ORDERED

Dated: Brooklyn, New York, August 31, 1994

(s) Carol Bagley Amon, United States District Judge

DENIAL OF ORDER TO SHOW CAUSE
TO LEARN PARTY App. 12 DEFENDANTS

Salvatore Moretti, Pro Se 8/19/94.
390 Park Street
Hackensack, New Jersey 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
EASTERN DISTRIDCT OF NEW YORK
ORDER TO SHOW CAUSE

SALVATORE MORETTI,
Plaintiff
vs.
CITIBANK, N.A. BRANCH NO. 11,
JOHN DOE, ET AL.
Defendants

To: Citibank Branch No. 11
415 Broadway at Canal Street
New York, New York 10013

Plaintiff Salvatore Moretti hereby moves the court on the basis of the certified complaint attached hereto and made a part hereof for an order to show cause requiring the Citibank branch no. 11, to reveal the nature of its responsibility in the within described grand larceny so as to provide for a list of defendants and responsible parties who may be party parties to this complaint, SAID ORDER RETURNABLE AT THE TIME FIXED BY THE COURT.

Date: Aug 19, 1994 SALVATORE MORETTI

STAMPED: ORDER TO SHOW CAUSE DENIED, SO ORDERED. (s) STERLING JOHNSON, JR.,U.S.D.J.
Dated: August 19, 1994, Brooklyn, N.Y.

GRANT OF EXTENSION TO REPLY
4/25/95.

App. 13

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of April one thousand nine hundred and ninety-five,

Salvatore Moretti

v. 95-7060

Citibank, N.A.

Appellant's motion requesting a one week extension to May 8, 1995 within which to file his reply brief is granted.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: (s) Catherine J. Minuse
Supervisory Staff Attorney

APR 24 1995

9/21/94 SUMMONS TO ANSWER. NEVER ANSWERED.

App. 14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
SUMMONS IN A CIVIL ACTION

SALVATORE MORETTI,

v.

CITIBANK, N.A. BRANCH NO. 11,
JOHN DOE, ET AL.

CASE NUMBER:
94 CIV. 6892
JUDGE PATTERSON

TO: CITIBANK, N.A.
c/o SILLS, CUMMIS, ET AL.
ONE RIVERFRONT PLAZA
NEWARK, NEW JERSEY 07102-5400

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY (name and address)

Pro Se
Salvatore Moretti
390 Park Street
Hackensack, New Jersey 07601

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK: JAMES M. PARKISON DATE: SEP 21 1994
BY DEPUTY CLERK: (s)

COMPLAINT FILED 11 DAYS FROM ROBBERY IN EASTERN App. 15 DISTRICT, 94-3944. EXPED- ited TO LEARN PARTIES, CRIME.

SALVATORE MORETTI
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646 - 1414

August 19, 1994

COURT STAMPED - CV 94 3944 AMON, J. CHREIN

United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Summons and Complaint, Salvatore Moretti vs. Citibank, N.A. Branch #11, and Order to Show Cause.

Dear Sirs:

Enclosed for filing is my complaint with regard to the defendant Citibank N. A. Branch # 11.

I am proceeding on an expedited basis to recover over $7,000 of funds stolen from me on August 8, 1994, but the appended Order to Show Cause and the complaint providing support for same was denied August 19, 1994.

It has been my experience from filing complaint in the federal district court in other districts that the summons is prepared by the court, but I will prepare same upon your request.

I have endeavored to discover the name of the thief who stole my money in the Citibank Br. #11 on August, 1994 but have been unable to do so, so the caption of the complaint reads John Doe to signify the thief or thieves. Also, disvovery has yet to reveal the coprorate identity of the insurers and/or branch affiliations which should be made party defendant within.

Very truly, Salvatore Moretti

cc: Citibank Branch No. 11, 415 Braodway at Canal Street, N.Y., N.Y. 10013

NOTICE OF APPEAL, C.A.95-7060, DISTRICT COURT 94-6892.App. 16

SALVATORE MORETTI,390 PARK STREET, HACKENSACK, NEW JERSEY 07601,PLAINTIFF PRO SE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SALVATORE MORETTI,
Plaintiff
vs.
CITIBANK, N.A., CITIBANK,
BRANCH NO. 11, MARY WING,
AND JOHN DOE, ET AL.,
Defendants

APPEAL TO THE COURT OF APPEAL
FOR THE SECOND CIRCUIT
D.C. No. 94-6892 (RPP)
TO:
UNITED STATES DISTRICT COURT
UNITED STATES COURT HOUSE
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007-1581

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007-1581

NOTICE IS HEREBY GIVEN THAT Salvatore Moretti, plaintiff pro se in the above entitled case, hereby appeals to the United States Court of Appeal for the Second Circuit from the Judgement by Hon. Robert P.

Patterson, J.U.S.D.C., entered on the twelfth day of December, 1994 denying the filing of an amended complaint, and granting the dismissal of the above entitled complaint.

SALVATORE MORETTI,
Plaintiff Pro Se

Dated: January 9, 1995

Service List:
Sills, Cummis, Zuckerman, Radin, Tischman, et al.
(On Behalf of Defendants, Citibank, N. A., etc.)
712 Fifth Avenue
20th Floor
New York, New York 10019

Formerly at:
250 Park Avenue One Riverfront Plaza
N. Y., N. Y.10177 Newark, N. J. 07102

SUBPOENA TO PRESERVE TAPE OF ROBBERY, ASSAULT/BATTRY App. 18 ,10/19/94, AFTER DELAYED UNTIL OCT.17,-94

SALVATORE MORETTI PREVIEW
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

October 19, 1994

Citibank, N.A.
Subpoena Compliance Unit
1 Court Square
Forty-First Floor
Long Island City, N. Y. 11120
att: Eileen Clancy

Re: Salvatore Moretti v. Citibank, Branch No. 11, John Doe, et al., Filed in the United Stated District Court in Brooklyn, on August 19, 1994, under docket No. Eastern District Docket No. 94-3944 (CBA) [Amon]; Transfer order pending to Southern District Docket No. 94-6892 (RPP) [Patterson]

Dear Madam:

Enclosed find my subpoena for the preservation of evidence in the above captioned civil lawsuit. I filed suit in federal district court. I viewed the film of the Citibank Branch No. 11, 415 Broadway, New York, New York 10013 at Citi-Alert, 450 West 33rd Street (Sixth Floor), New York, New York. The video cassette contained still photos from cameras one and two [the entry to the bank with five ATM's], but excluded cameras three and four [which showed the interior of the bank where the robbery itself occurred at 2:00 p.m. on August 8, 1994.]

The enclosed subpoena is premised upon your statement that the cassettes are not kept unless notice arrives immediately. As noted the suit was filed eleven days after the robbery; the manager was notified immediately, the police arriving to investigate at 2:29 p.m. on August 8, 1994.

While the video cassette from cameras three and four was excluded from my preview on October 17, 1994, these cameras recorded the most relevant film, the robbery itself; cameras one and two recorded only patrons walking into and out of the bank. The bank's allegation that caameras three and four were not presented may be based upon security reasons, but I maintain that such security was breached when the film depicts a federal bank robbery in which I was robbed.

Very truly,

_____

Salvatore Moretti

enc.

CERTIFIED MAIL NO. P325 541 742

RETURN RECEIPT REQUESTED

REPONSE TO CITIBANK FILING MOTION TO DISMISS App. 20 PRIOR TO ANSWER, PRIOR TO TRANSFER HEARING, TWO DISTRICTS Oct 13,'94

SALVATORE MORETTI
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

October 13, 1994

United States District Court
Southern District of New York
United Startes Courthouse
Foley Square
York, New York 10007

United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Summons & Complaint, Salvatore Moretti vs. Citibank N.A. Branch #11, John Doe, et al., Motion to Dismiss, Order to Transfer etc., Opposition Papers by Plaintiff, Pro Se, Eastern District Docket No. 94-3944 (CBA)[Amon], Southern District Docket No. 94-6892 (RPP)[Patterson]

Dear Clerk of the Court:

Kindly file the follwing oppostion papers to the above captioned motion(s) filed by the defendant, Citibank, on behalf of themselves, but in favor of the unnamed defendant(s), John Doe, et al. You will note from the foregoing double addressing of these papers that the attorneys for Citibank have filed two motions on successive motion days in two courts, both of which presumably may be answered

timely despite the lack of service of process on Citibank in one or both courts.

While the Eastern District sua sponte has issued a transfer order to the Southern District [August 31, 1994, by Hon. Carol Bagley Amon], the Southern District claims service of summons and complaint is required to given them jurisdiction - the summons and complaint is required to give them jurisdiction - the summonses have yet to be prepared by the court. The complaint was served by order to show cause [Denied on August 19, 1994, Hon, Sterling Jognson, U.S.D.J. Brooklyn, N.Y.], in order to proceed on an expedited basis, consequent upon the federal bank robbery subject of the within legal aciton.

Clearly oral argument cannot be presented on the return date of October 21, 1994 at two district courts, which will allow the defendan(s) to proceed on an ex parte basis, in either one or both courts, which is their preference not this party's.

Very truly,
Salvatore Moretti

Encl. Opposition Papers
cc: Jeffrey Weinhaus, Esq.,
Sills, Cummis et al., Newark, N.J.

CERTIFICATION OPPOSING DISMISSAL/
TRANSFER FILED App. 22 BY MORETTI
OCT 13,'94
SALVATORE MORETTI, PRO SE IN 2
390 PARK STREET FEDERAL DIST. CTS.
HACKENSACK, NEW JERSEY 07601
(201) 646-1414
UNITED STATES DISTRICT COURT
Eastern District of New York
94-CV-3944 (CBA)
Southern District of New York
94-CV-6892 (RPP)

SALVATORE MORETTI,
Plaintiff
v.
CITIBANK, N.A. BRANCH
NO. 11, JOHN DOE, ET.
AL,
Defendant(s)

CERTIFICATION IN OPPOSITION TO MOTIONS TO TRANSFER/DISMISS.

Salvatore Moretti, plaintiff in the above captioned civil lawsuit, hereby declares under oath as follows:

1. I am the plaintiff in the above captioned lawsuit, and a depositor at the Citibank Branch No. 11, located at 415 Broadway at Canal Street, New York, New York.
2. The subject of this lawsuit is a series of bank robberies and attempts conducted at the Citibank Branch No. 11, over period of several months.
3. The Citibank has failed to produce the records to da- which I have requested, claiming that their legal department refuses to release the requested information.
4. I have contacted the first precinct police department but they either claim that no bank robbery occurred, or if it

occurred, they have no jurisdiction. Police Headquarters defers to the first precinct, while the first precinct defers to headquarters. If the federal government handles bank robberies, then the state(city) police cannot do so, but if the robbery occurred in [1] the bank but was not "of" the bank, then no bank robbery occurred, resulting in no one investigating the crime.

5. It is apparent from inspecting the moving papers by the defendant Citibank that they have not conducted an appropriate investigation into the facts of this case. For example, while the defendants are charged with keeping accurate records of my financial dealings, they claim that they are uninformed as to the scope of this robbery, to wit that the federal district court jurisdicitonal minimum of $50,000 has not been reached. Their records show that over three times that amount of money has been deposited into their bank since opening of the account in June, 1993. Also, the defendants claim that the drafting of the complaint and service by order to show cause requires dismissal since an expedited basis is improper for bank robberies under the Federal Bank Robbery Act, which states in part as follows:

18 U.S.C. Section 2113. Bank Robbery and incidental crimes - (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

6. While the federal jurisdiction conferred by the above

statutory violation is obvious based upon the robbery at Citibank, it has been denied, either in whole or in part, by Citibank. The series of bank robberies began sometime in early 1994, and have [2] included most notably four separate crimes, the last of which precipitated the filing of the complaint on August 19, 1994, in the United States District Court in Brooklyn, New York. 94-CV-3944 (CBA). My letter of transmittal of that complaint explained that "I am proceeding on an expedited basis to recover over $7,000 of funds stolen from me on August 8, 1994," but the appended Order to Show Cause and the complaint providing support for same was denied August 19,1994. The last of the series of bank robberies occurred on August 8, 1994 at 2 p.m. The police arrived from the first precinct located just blocks away a half hour later, too late to retreive the stolen loot.

7. The defendant Citibank apparently classify the occurrence on August 8, 1994 at Branch No. 11 as a larceny, but they have suppressed information as to the robbery, which is included in film records from cameras located at the rear of the Citibank branch No. 11 - they claim the cameras were switched off. It is incredible that Citibank maintains non-operating cameras on site. Do they seek to use them for their own purposes while interfering with the investigation of this civil action for recovery of $7,300 (over $7,000 in cash)? If they are allowed to retain such film records for over two months, these records can be doctored so as to produce a record in accord with their corporate needs, not in accord with the public good.

8. Robberies from my account at the Citibank have included the notification that $1,250.00 was being deducted from my account as [3] of June 28, 1994, because Citibank denied receiving my cash deposit in that amount on that date. They

classified the "cash" deposit made on June 28, 1994 as a "check" deposit, and then claimed that since they never received the "check" they refused to credit my account with the "missing check". Despite the fact that the teller marked as received "$1,250.00 in cash", plus five checks, for a grand total of $3,145.95, Citibank claimed that the teller's entry should have been for a "check" for $1,250.00. In fact, the largest check was for half that amount. Such discrepancies occurred regularly, and were not only not corrected, but the latest robbery was merely one of a number of such incidents.

9. While Citibank possesses the above records, it claims: "in count 2, plaintiff claims that he was robbed of $7,336.00. However, the complaint seems to indicate that a lesser amount was actually taken. For example in count 2, plaintiff alleges that "[a]s soon as the grand larceny occurred, plaintiff called out that a robbery of three thousand dollars of wrapped bills had just occurred." Paragraph No. 10.

In fact the complaint states as follows at Paragraph No. 10:

"as soon as the grand larceny occurred, plaintiff called out that a robbery of three thousand dollars of wrapped bills had just occurred, in order to set off the surveillance cameras and to alert the security personnel, but with no response at all from any guard to stop the person who took the money."

Presumably, the Citibank would have the robbery victim call out the check numbers stolen, then the dollar amount of each denomination bill, and then allege that a statutory violation occurred, all within time to alert the guards that a

robbery was in progress, so as to have them turn on the cameras to capture [4] the thief on film.

10. Citibank claims that "apparently in recognition of the jurisdictional requirements, plaintiff does allege that he had deposited over $50,000 in his checking account. Complaint p. 2. It is clear from the complaint, however, that plaintiff alleges no wrongdoing or loss with respect to this $50,000." Based on this Citibank concludes that "here, it is clear from the face of his complaint that plaintiff has failed to meet the burden of establishing the existence of the jurisdictional amount ($50,000) in controversy." If Citibank checked its records, as it is required to do in order to file court papers, it would have substantiated deposits of over $145,000. It is a fact question for the jury to infer how this much money could have secured loans requested by plaintiff, rather than for counsel to infer that denial of loans was not on the based on prejudice or is not part of the damages due to the conduct of the defendant, Citibank.

11. Citibank has admitted that one person fleeing the area who punched me in the back was photographed. This person had sufficient knowledge of the scuffle following the robbery, so that his testimony should have been secured. Instead, he was questioned by Citibank as if he was the robber. This man was trying to draw attention to the brawl which ensued upon the grabbing of the bank deposit bags. [These bank bags were conspicuous in their being from two out-of-state New Jersey banks]. The battle which followed from the robbery has apparently been suppressed by Citi [5] bank, so that even the bank manager believed that this person - who was required to alert plaintiff as to what had just occurred by punching him in the back after the battle - was thought to be the robber [his being the robber could

not be substantiated by questioning him]. This man carried a valise. Inquiry was made of bank patrons merely on the basis that they carried valises "due to my suggestion", when in fact I was the one carrying a valise, not the robbers. What I stated was that the two bank bags should have identified the robber(s) since I would be the only one in the bank carrying a bank deposit bag from Garden State National Bank - a bank which changed its name over ten years ago in New Jersey, and is now known as the First Fidelity Bank. The bank robber grabbed the money and the bank deposit bags at the same time and was allowed to escape due to the incompetence of the bank security personnel - all factors to be considered by the jury, rather than upon a motion to dismiss due to failure to allege the requisite amount in controversy. Is the bank alleging that an assault and battery could occur and now be basis for recovery in a robbery which they admit to photographing in part at least? Apparently the bank's lawyers require that over $50,000 be robbed in order to meet the amount in controversy requirement giving federal jurisdiction, a statement coming from a paralegal, not meriting serious discussion within United States District Court papers. The complaint filed specifically refers to both grand larceny and robbery, but then leaves the robbery open to [6] investigation so as to discover the identity of the robber, John Doe, et al. (and others).

12. Since the complaint was filed eleven days after the robbery, the bank should have supplied facts within the last two months, yet they have failed to do so and now their lawyer alleges that the complaint cannot be amended. In fact, I am awaiting information from Citibank, but this information is being withheld by the bank. The bank lawyer is indulging in a form of circular reasoning which is facially

suspect. The lawyer for Citibank states that, "plaintiff's damages, allegedly resulting from a 'grand larceny,' are fixed money damages that include the amount allegedly stolen and arguably, incidental damages resulting therefrom. Plaintiff has asserted these claims to the fullest extent possible and cannot, in good faith, amend his complaint to increase his claimed damages more than threefold in an attempt to satisfy the stautory amount in controversy." If the bank were a boxing ring, this statement would be plausible, since the bank patrons could come to see a brawl. But Citibank is a bank licensed by the State of New York and insured by the Federal Deposit Insurance Corporation; it is regulated by the rules of banking institutions. Citibank is clearly not protected when it operates like a sports arena providing thrills for its patrons. The statements made by Citibank are implausible at best. The nature of the assault and battery described in the bank in front of over fifty alarmed patrons, who themselves are at risk should they inter [7] fere, suggests the scope of the action is greater than admitted by this defendant - Citibank. Does Citibank suggest that a two hundred fifty pound six foot three inch robber should be tackled by a woman carrying a hand bag?

12. I received motion papers to dismiss which were returnable on October 7, 1994, said papers stating, "PLEASE TAKE NOTICE that upon the annexed Declaration of Jospeh (sic) L. Buckley with attachments, Memorandum of Law, and on all the pleadings in this action, defendant, Citibank, N.A. ("Citibank"), will move this Court before the Hon. Carol Bagley Amon at the Courthouse, 115 Cadman Plaza East, Brooklyn, New York 11201, Courtroom 8, 6th Floor, on Friday, October 7, 1994, at 2:00 p.m., or as soon thereafter as counsel may be heard: (i) for an Order, pursuant to Fed. R. Civ. P. 12(b)(1), dismissing plaintiff's action

for lack of jurisdiction over the subject matter; and (ii) for such other and further relief as the Court may deem just and proper. In fact, the action was tranferred by order dated August 31, 1994 due to "venue". The order reads in part that" "plaintiff, pro se, brings this action pursuant to 28 U.S.C. Section 1332 alleging inter alia, 'grand larceny' of his bank account. Under 28 U.S.C. Section 1391, a civil action founded on diversity of citizenship may be brought only in 'a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.' Since defendants Citibank N.A. Branch is located at 415 Broadway, at Canal Street, which is located in the Southern District of New York, the action should be and [8] hereby is transferred to the United States District Court for the Southern District of New York. 28 U.S.C. Sections 1391(b), 1406(a). That provision of Rule 26 of the Local Rules for the Eastern District of New Yorek which requires a five day delay is waived. SO ORDERED. Dated: Brooklyn, New York August 31, 1994. (s) Carol Bagley Amon, U.S.D.J. Apparently, the judge in quoting subsection (b) failed to consider subsection (c) which applies in the case at bar, to wit that:

28 U.S.C.A. Section 1391. Venue Generally

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has

more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and , if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

The determination of significant contacts from the point of view of Brooklyn, New York would include checks cleared in Brooklyn, branches located in Brooklyn which are held out as being within the reach of patrons to secure ATM cash, bank services, etc. Clearly, Citibank does possess such branches in Brooklyn, and a list of them is provided here for reference:

BROOKLYN BRANCHES OF CITIBANK

Bay Bridge, 8515 4th Ave.,86th St
Bay Ridge, 7501 3rd Ave., 75th St.
Bedford Stuyvesant,1398Fulton St.
Bensonhurst,6414 18th Ave.,64th St.
Bensonhurst, 1630 Shore Pkwy.
Borough Park, 5420 13th Ave.
Brooklyn Heights, 181 Montague St.
Brooklyn Heights, 147 Montague St. ***
Bush Terminal, 934 3rd Ave.* [9]
Canarsie, 1449 Rockaway Pkwy.
Ridgewood, 1455 Myrtle Ave.
Carroll Gardens, 375 Court St.
Carroll Gardens, 131 Union St.

City Line, 1200 Liberty Ave.
Clinton Hill, 430 Myrtle Ave.
Downtown Brooklyn, 370 Jay St.
Dyker Heights, 7101 13th Ave.
East Flatbush, 702 Utica Ave.
Flatbush, 885 Flatbush Ave.
Flatbush/Ave. P. 2060 Flatbush Ave.
Georgetown, 1992 Ralph Ave.
Greenpoint, 836 Manhattan Ave.
Kings Bay, 3830 Nostrand Ave.
Midwood, 1501 Kings Hwy.
Midwood, 1220 Ave., J 13th St.
Midwood, 1411 Kings Hwy.
Park Slope, 114 7th Ave.
Ridgewood, 1455 Myrtle Ave.
Sheepshead Bay, 1528 Sheepshead Bay Rd.
Starrett City, 1388 Pennsylnia Ave.
Sunset Park, 5324 5th Ave.
Sunset Park, 6300 8th Ave., 63rd St.

When I filed the complaint in the U. S. District Court in Brooklyn, New York, I had im mind these branches of Citibank. Brooklyn is where a substantial amount of my banking needs are. To surmise as Judge Amon does that subsection "c" of the federal statute does not apply is unfair. To proceed to transfer without consideration of factual allegations beyond the language of the statute, and without oral argument, does not effectively transfer jurisdiction to

Manhattan District Court, but produces a mystery as to where jurisdiction is placed. To complicate that mystery, the defendant Citibank has filed a motion to dismiss within four days of the order to transfer, and without ever answering the complaint, or telephoning me to ascertain that Judge Amon transferred to Manhattan District Court. Citibank in fact claimed that Brooklyn was not where venue belonged, and based its motion to dismiss on venue. Now that venue was "transferred," Citibank sends additional notices to dismiss quoting the precise language of its former paperwork. The Citibank's moving papers do not recognize that the bank has handled my banking needs for over one year. Consider that Citibank claims that the jurisdictional amount in controversy is not over $50,000 eleven days after the [10] robbery, when the robber has not been apprehended, on the basis of Citibank's withholding film of the bank robbery. Consider as well that the Citibank has received deposits by myself of over $145,000, and cleared five hundred checks. This suggests the bank has unfair advantage which is controlled by the federal regulators, not subject of the United States District Court's treatment thus far.

13. Citibank admits that a court may "examine the entire complaint to determine whether the jurisdictional amount is in controversy. Corcoran v. Royal Development Co., 35 F. Supp. 400, 401 (E.D.N.Y. 1940). In the instant action, an examination of the entire complaint reveals that plaintiff's damages are clearly not in excess of $50,000." Paragraph 18 of the complaint states that "despite the attempts by plaintiff to secure relief...he was told that no one was responsible...this investigation has resulted in consequential damages of not being able to pay bills in the amount of $7,336, which further caused liens on plaintiff's business, worth over $1,000,000." Citibank does not question that

liens were placed upon my real property endangering the solvency of $1,000,000 of real estate. It concludes, however, that these liens may not reduce real estate values by $33,000, and thereby hopes that the court will dismiss the lawsuit. This is a fact-question in this jury case, and for the Citibank lawyer to make factual determinations in advance of trial as to what may or may not be considered evidential at trial is improper. Citibank does [11] not appear to recognize that the Federal Banking Laws exist to prevent interstate bank robberies, such as the one that occurred at Citibank on August 8, 1994. On the day in question, thieves came well prepared to commit their crime, enter the bank with the intent required under the federal bank robbery statutes, [which make the federal statutes applicable to anyone who enters a bank with the intent to commit a felony], committed the felony, and now the bank claims that no bank robbery occurred since it is not responsible. The federal statutes were enacted precisely to cover cases where banks would claim such lack of responsiblity.

14. The foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: October 13, 1994 SALVATORE MORETTI
PLAINTIFF PRO SE

CITIBANK's ADMISSION OF THEFT AUG 8,'94
AT BR. 11,17 DAYS App. 34 -S AFTER CRIME,
ON AUG 25.

CITIBANK N.A. BR. #11
415 BROADWAY AT CANAL STREET
NEW YORK, N. Y. 10013

August 25, 1994

Salvatore Moretti
390 Park Street
Hackensack, N.J. 07601

Dear Mr. Moretti:

Thank you for your recent letter. As the Manager of the Canal St. branch I am pleased to respond.

Please accept my personal apology for the distress and concern you experienced on August 8th at the Canal St. branch. We have posted "Safety Tips for Customers" notices in the branch to remind our customers of the need to protect their property. It is difficult to detect the presence of thieves in a public place, and as you know, they move very quickly. One needs to be ever alert to the possible actions of others.

While I regret your loss and are especially sorry it occurred while you were in the branch, we are unable to reimburse you for the theft.

Thanks again for writing and givimg me the opportunity to address this important issue.

Sincerely,
Tony D'Amico, Branch Manager

NOTICE 11/22/94 BY MORETTI TO VACATE DISMISSAL,& TO FILE AMENDED COMPLAINT SOUDING IN RICO,FILED EASTERN/SOUTHERN DISTRICT

SALVATORE MORETTI, PRO SE
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
Eastern District Docket No. 94-3944 (CBA)[Amon]
Transfer Order Pending to:
Southern District Docket No. 94-6892 (RPP)[Patterson]

SALVATORE MORETTI,
Plaintiff
vs.
CITIBANK, N.A. BRANCH NO. 11, JOHN DOE, ET AL.,
Defendants

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Salvatore Moretti, pro se, affirmed on November 22, 1994, and upon the appended brief, plaintiff pro se will move this Court, Robert P. Patterson, Jr. U.S.D.J., upon oral argument, in Room 302, United States Courthouse, Foley Square, New York, New York 10007, on Thursday, December 8, 1994, at 4:00 p.m. or as soon as counsel may be reached, for an order (1) to file amended pleadings under Rule 15, and (2) to set aside the order entered October 31, 1994 on the basis of the law set forth in the appended brief, and (3) for such further relief as the Court may deem just and proper. Pursuant to Rule 3 of the local rules of the Southern District of New York defendant's opposition papers will be served at least seven (7) days before the return date of this motion, and plaintiff's reply paper shall be serve at least two days before the return date of this motion.

Dated: Nov.22, 1994 Very truly, (s)Salvatore Moretti
To: Sills, Cummis, (Citibank, N.A.), 250 Park Avenue, Suite 1200, N.Y., N.Y.;and also 1 Riverfront Plaza, Newark, N. J.

SALVATORE MORETTI
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

November 22, 1994

United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Summons & Complaint, Salvatore Moretti vs. Citibank N.A. Branch # 11, John Doe, et al., Motion to File Amended Complaint, Motion to Set Aside Dismissal, etc. Eastern District Docket No. 94-3944 (CBA) [Amon]. Southern District Docket No. 94-6892 (RPP) [Patterson]

Dear Clerk of the Court:

Kindly file the enclosed motion papers pursuant to the within brief to set aside the order entered October 31, 1994, and to file an amended complaint.

Very truly,

Salvatore Moretti, Pro Se

enc.

cc: Sills, Cummis, et al. (On Behalf of Citibank)

SALVATORE MORETTI, PRO SE
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414
UNITED STATES DISTRICT COURT
Southern District
Docket No. 94-6892 (RPP) [Patterson]
ORDER SETTING ASIDE DISMISSAL, AND TO AMEND.

SALVATORE MORETTI,
Plaintiff
vs.

CITIBANK, N.A. BRANCH NO. 11, JOHN DOE, ET AL.,
Defendants

Upon notice to the defendant Citibank, N. A. and upon oral arguement presented on the eighth day of December, 1994, in the Courtroom of Hon. Robert P. Patterson, Jr., U. S. D. C., in the Southern District of New York, United States Courthouse, Foley Square, at 4:00 p.m., it is hereby ORDERED THAT:

The order of dismissal is stayed pending receipt of an amended complaint, and FURTHER ORDERED THAT,

The amended complaint be filed and served by

And also ordered that a copy of this order be served upon all parties in interest within five (5) days of entry.
(not signed)-HON.ROBERT P. PATTERSON, J.U.S.D.C.
Papers Considered
_____Notice of Motion _____
_____Brief in Support _____
_____Brief in Opposition _____
_____Other _____

SALVATORE MORETTI, PRO SE
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
Eastern District. Docket No. 94-3944(CBA)[Amon]
Transfer Order Pending to:
Southern District: Docket No. 94-6892(RPP)
[Patterson]. AFFIRMATION OF SERVICE
OF NOTICE OF MOTION TO FILE AMENDED COMPLAINT, TO SET ASIDE DISMISSAL, ETC.

SALVATORE MORETTI,
Plaintiff

vs.

CITIBANK, N.A. BRANCH NO.
11, JOHN DOE, ET AL.,
Defendants

I, Salvatore Moretti, declare under penalty of perjury that I have served a copy of the atteached motion to file an amended complaint, and motion to set aside the order of dismissal upon Sills, Cummis, et al., (On Behalf of Citibank, N.A.), whose addresses are 250 Park Avenue, Suite 1200, N.Y., N.Y. 10177-0040; and also 1 Riverfront Plaza, Newark, N. J. 07102-5400.

Date: November 22, 1994

(s) Salvatore Moretti, Pro Se
390 Park Street
Hackensack, New Jersey 07601

FILING OF AMENDED COMPLAINT ON RETURN DATE OF ORAL App. 39 ARGUMENT, DEC 8 '94

SALVATORE MORETTI
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

December 8, 1994

United States District Court
Southern District of N. Y.
United States Courthouse
Foley Square
New York, New York 10007

U. S. District Court
Eastern District of N. Y.
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: Summons & Complaint, Salvatore Moretti vs. Citibank N.A., et al. Branch # 11.

Dear Sirs:

Enclosed for filing is my complaint (the amended complaint sounding in RICO) with regard to the defendant Citibank N.A. Branch # 11.

Very truly,

(s) Salvatore Moretti

enc.
cc: Sillis & Cummis, et al. (On Behalf of Citibank)

Salvatore Moretti, Pro Se
390 Park Street
Hackensack, New Jersey 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Docket No. 94-6892 (RPP)

SALVATORE MORETTI,
Plaintiff

vs.

CITIBANK, N.A., CITIBANK
BRANCH NO.11,MARY WING,
JOHN DOE, ET AL.
Defendants

COMPLAINT WITH JURY DEMAND
FIRST AMENDED COMPLAINT
RICO, TORT

JURISDICTION

1. This action arises under the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 USCS Section 1961, and the Laws of the State of New York. Plaintiff seeks to recover compensatory and punitive damages sustained, as a result of the conduct

[2]

of Citibank, N. A. and Citibank Branch No. 11 (hereafter Citibank), and John Doe, et al. (the thief or thieves), as a result of the Defendants' conduct, along with the costs of

this suit, interest and reasonable attorney's fees. The court's jurisdiction is invoked under 28 USC Section 1331, 28 USC Section 1332, 28 USCS Section 1337, 18 USCS Section 1964(c), and the doctrine of pendent jurisdiction.

PARTIES

2. The Plaintiff, Salvatore Moretti, is a citizen of the State of New Jersey and is engaged in the rental of apartment house property, and other business activites in New Jersey, for profit.

3. The Plaintiff, Salvatore Moretti, who resides at 390 Park Street, Hackensack, New Jersey, is the owner of the apartment house located at 391-7 Park Street, Hackensack, and opened a checking account at Citibank, Branch No. 11 on May 28, 1993, wherein he deposited over $145,000 of funds from May 28, 1993 to August 8, 1994.

4. The Defendant, Citibank, N.A. is a federally insured national bank operating under a federal charter of the Comptroller of the Currency (having offices in Manhattan), with branches throughout the five boroughs of New York, and throughout the country.

5. The Defendant, Mary Wing, is an Assistant Vice-President of the Citibank, N.A. and at all times from the opening of the Plaintiff's account at Citibank Branch No. 11 up to August 8, 1994 was employed at the Citibank Branch No. 11, located at 415

[3]

Broadway at Canal Street, New York, New York 10007.

6. The Defendant, Mary Wing, upon opening the checking account of the Plaintiff, inspected Plaintiff's credit card transactions which had been made with two Citibank Credit Cards. Thereafter, she maintained surveillance over the deposits Plaintiff made at the Citibank Branch No. 11 since her office was adjacent to the ATM machine located at the rear of the bank, which ATM machine was used by Plaintiff to secure his balance prior to depositing his funds.

7. At all times pertinent to the allegations of this Complaint, the Defendants Mary Wing and John Doe, among others, but not limited to Mary Wing and John Doe, were acting in concert with, or under the direction and control of the Defendant Citibank, N.A.

8. The acts committed by the Defendants as alleged herein were done by them personally either while present in, or by the use of the mails, telephone, computer networks, and other instrumentalities in interstate commerce to and from New York, and elsewhere.

9. The acts of each Defendant and each employee, agent and representative of Citibank, NA are deemed to be the acts of, and are chargeable to and binding upon every other Defendant.

FACTS

10. Beginning on May 28, 1993, Salvatore Moretti entered into a contract with the Citibank N.A. Branch No. 11 in the State of New [4] York, whereby Citibank, N.A. agreed to accept for deposit into a checking account under the name of Salvatore Moretti cash and checks in excess of $145,000, as well as to cash checks drawn upon said checking account.

11. Under the terms of this contract, Plaintiff intended to maintain banking account privileges at the Defendant Citibank and to secure loans at said banking institution for the operation of his apartment house and related properties at 391-397 Park Street, Hackensack, etc., with assessment of over $1,000,000.

12. The Defendant Citibank entered into negotiation with Plaintiff for the loan of moneys, including quotes of interest and telephone conversations from the bank's offices to its central loan department.

13. The loans were required to meet the operating expenses due to high real estate taxes and high water charges on the Hackensack properties during the pendency of litigation in the United States Supreme Court and the United States Court of Appeals for the Third Circuit. Failure to meet payments would result in shut off of water supply due to a waterbill of $13,000, or tax sale of the subject real property owned by Plaintiff for over twenty years.

14. Beginning about August, 1993, negotiations for loans began which continued up to February 25, 1994, when interest quotes were given to Plaintiff indicating the Defendants were not negotiating pursuant to commercial loan rates offered its regular customers. [5]

15. The Defendant Citibank N.A. sent three notice to Plaintiff between May 18, 1994 and June 28, 1994 stating that, "because of an error in addition, there was a discrepancy between the amount shown on your deposit ticket and the actual amount credited to your accont. To correct this error, $----.-- dollars has been deducted from your account. This adjustment will appear on your statement with the description 'Deposit Error'. If you have any questions,

please call a Customer Service representative ..." The amounts of the alleged discrepancy were $100 or over, and at times over $1200. A $1,200 cash deposit was not credited to the account, on the pretext the cash was a check and the check was not included with the bank deposit ticket. These notices were despite the deposit tickets held by plaintiff showing the money was received by the bank teller on the day and date credited. There was always a deduction to plaintiff's account, and the source of the error was never explained despite calls to the numbers listed on the notices.

16. Contrary to bank regulations, upon Plainitff's complaining to the Citibank complaint department at the telephone numbers listed on the notices, (about illegal deductions from his account), Plaintiff was harrassed by men who were stationed around Plaintiff at the rear of the Citibank Branch No. 11 next to the ATM machine and adjacent to the private office of Mary Wing. They were distinguishable in that they were taller than the bank patrons (they were chosen to be from 5'10" to 6'4" tall) and [6] huskier (from 190 lbs. to 250 lbs.), and all male (both black or white). Upon at least five occassions, at least four men were stationed around Plaintiff next to Wing's desk during deposits on May 3, 1994, May 18, 1994, June 3, 1994, June 28, 1994, June 30, 1994, July 7, 1994, July 15, 1994, and finally on August 8, 1994. These men on at least four occassions tossed money on the floor, either on the opposte side of the bank rail and desk at which Plaintiff stood, or several feet away from the desk requiring Plaintiff to turn aside to pick up the money (presumably dropped from Plaintiff's bank deposit) so that his $7,000 deposit could be stolen. Repeatedly Plainitff quickly removed himself from the site, closing his valise to secure his deposit.

17. The average deposit made at the bank on each occassion was in excess of $7,000, so that over twenty deposits were made totalling over $140,000; this money was the rent collected from Plaintiff's apartment house and real property office located in Hackensack, State of New Jersey.

18. On or about August 8, 1994, Mary Wing, Citibank N.A. and John Doe, et al., conspired to rob Plaintiff of his entire bank deposit, for which his deposit ticket was prepared. John Doe stood in Mary Wing's private office about ten feet in front of Plaintiff and the desk at which he stood. A co-conspirator tossed fifteen one dollar bills on the floor to the left of the Plaintiff and five feet away. John Doe (a while male about 34 years of age and over 200 pounds, waited in the office six feet away for [7] plaintiff to bend over to the left so that he could grab the $7,000 deposit and flee the area. When that did not occur, John Doe moved toward the desk at which Plaintiff stood with his gray valise, containing two bank deposit bags (a green bank bag from Garden State National Bank - name changed some years ago - and a blue bag from United Jersey Bank). Several other men dressed in dark suits closed ranks around Plaintiff so as to assure the success of the robbery - said men appearing to be members of the Citibank security department. John Doe grabbed the two bank bags containing cash of $7168 (inclusive of one small check for about $170). Plaintiff upon seeing this grappled with John Doe but John Doe struggled to retain his deposit. The men cordoning off the area refused to assist Plaintiff and in conspiracy with John Doe assisted him to escape while at least twenty-five bank patrons looked on helplessly nearby. The Citibank Branch No. 11 held as many as one hundred people who were confined to an area no larger than 25 feet by 50 feet. Plaintiff called out "$3,000 in wrapped $20 bills have been stolen, Stop that man (John Doe, herein)" to start security

cameras, and alert guards, if any were present. There were no uniformed guards on site, presumably non-uniformed guards alone were available.

19. Plaintiff filed a complaint (and order to show cause) in t he United States District Court in Brooklyn on August 19, 1994, within eleven days of the bank robbery, stating that "Plaintiff was victimized by a well rehearsed grand larceny as a result of [8] frequenting the bank and depositing moneys into the account." Plaintiff demanded copies of the bank videotapes from the bank cameras which were operating during the robbery, in order to apprehend John Doe et al, and to regain possession of his bank deposit. Citibank stated either the cameras were not operating or that tape could be viewed only with an escort. When Plaintiff viewed the videotapes, he was prevented from securing copies of the tapes, despite the equipment being available at the offices of Citibank. The bank security department blanked out the two cameras which were directly aimed at the robbery site in the rear of the bank. The bank has refused to release the film record of this robbery, preferring to claim that the only cameras operating at the time were at the entry to the bank. Plaintiff served a subpena upon the bank at Citibank, N.A., Subpoena Compliance Unit, 1 Court Square, Forty-First Floor, Long Island City, N. Y. 11120, att: Eileen Clancy. Citibank has refused to produce the subpenaed videotape. A bank patron standing at an ATM line informed plaintiff what occurred, another patron ran over to assist. The bank manager advised plaintiff that the patron was interrogated, thinking him to be the robber, erroneously.

20. The police were called from an office at the bank. Despite plaintiff's description of the robbery to the police at

2:30 p.m., one-half hour after it occurred on August 8, 1994, no arrests were made. Complaint no. 9430 was opened by the first precinct police department on August 8, 1994; the chances of getting plaintiff's money back were stated to be "zero". The bank [9] alleged that they were not insured. The police department deferred to the bank which deferred to the police department.

COUNT 1 - RICO

21. Citibank, N.A. and Citibank Branch No. 11 are an enterprise as that term is defined in 18 USCS Section 1961, engaged in interstate financial activities. Such activites in and affecting interstate commerce include, inter alia, the borrowing and lending of money to individuals, associations, and corporations whose businesses are directly involved in intersate commerce. More particularly, Defendants violated Section 1344 of the RICO statute (relating to financial institution fraud), Section 1951 (relating to robbery and extortion),

22. The Defendants in violation of New York State Laws are guilty of theft. As officers of or employees of a financial institution they are in violation of the following New York Penal Law Sections:
Section 120.05 -
A person is guilty of assault in the second degree when:
1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or...
Assault in the second degree is a class D felony.

Section 155.05. Larceny; defined.

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding [10] of another's property, with the intent prescribed in sudivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses...

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means instilling in him a fear that, if the property is not so delivered, the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or...

(viii) Use or abuse his position as a public servant by perfoming some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(ix) Perfom any other act which would not in itself materially benefit the actory but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Section 160.10 Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the

crime:
(a) Causes physical injury to any person who is not a participant in the crime; or
(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.
Robbery in the second degree is a class C felony.

23. The Defendants informed of the foregoing deny any and all liability for same, and it can only be understood since they are in the banking business that they will use the stolen funds for purposes connected with their enterprise.

24. The violations of the various sections of the New York State Criminal Code pertaining to theft, embezzlement and other fraudulent offenses which occurred on more than one occasion in the last ten years constitutes a pattern of racketeering activity in violation of 18 USCS Section 1962, for which treble damages, [11] costs of suit and attorneys' fees may be sought under 18 USCS Section 1964(c).

25. The use of the mails and wire for the purposes of effectuating the aforesaid scheme to defraud Plaintiffs, which occurred on more than one occasion in the last ten years, constitutes a pattern of racketeering activity in violation of 18 USCS Section 1962, for which treble damages, costs of suit and attorney's fees may be sought under 18 USCS Section 1964(c).

26. The individual Defendants and Defendant Citibank in violation of 18 USCS Section 1962 used their knowledge of the Plaintiff's confidential banking to secure control over his real estate holdings, reducing equity in his property (assessed over one million dollars) to zero, for which treble damages, costs of suit and attorney's fees are required under 18 USCS Section 1964(c).

26. The individual Defendants and Defendant Citibank's N.A. agents or employees, including Mary Wing and John Doe, in violation of 18 USCS Section 1962(c), conducted the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity for which treble damages, costs of the suit and attorney's fees are required under 18 USCS Section 1964(c).

27. The individual Defendants, Defendant Citibank N.A., in other persons including Mary Wing. John Doe, et al., aided, abetted, counseled, commanded, induced or procured the commission of the violations of the Federal Mail Fraud, Wire Fraud and RICO Statutes. and therefore are each liable as principals pursuant to [12] 18 USCS Section 2.

WHEREFORE, Plaintiff demands $500,000 in damages and attorney's fees and costs, and such consequential damages as may be established at the trial of the matter within.

Date:December 8,1994 SALVATORE MORETTI,PLAINTIFF PRO SE

ORIGINAL COMPLAINT FILED 11 DAYS AFTER ROBBERY IN THE CITIBANK BRANCH NO. 11, 415 BROADWAY, NEW YORK CITY, FILED IN EASTERN DISTRICT OF FEDERAL COURT, 94-3944 DOCKETED AUG. 19, 1994; TRANSFERRED AUG. 31, 1994 BY JUDGE AMON, DOCKETED 94-6892(RPP) IN SOUTHERN DISTRICT, SUMMONSES PREPARED 9/21/94; NEVER ANSW'D SERVICE BY ORDER TO SHOW CAUSE DENIED AUG. 19, '94 DISMISSED 10/31/94 BY JUDGE PATTERSON. FILING AMENDED COMPLAINT DENIED 12/12/94.

Salvatore Moretti, Pro Se
390 Park Street
Hackensack, New Jersey 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
COMPLAINT WITH JURY DEMAND
TORT

SALVATORE MORETTI,
Plaintiff

vs.

CITIBANK, N.A. BRANCH NO. 11,
JOHN DOE, ET AL.
Defendants

JURISDICTION

Jurisdiction of this court is invoked due to diversity jurisdiction in that the defendant bank, Citibank, is a New York bank, while the plaintiff is a citizen of New Jersey.

Jurisdiction of this court is also invoked due to the fact that the robbery occurred in N. Y. C. at the premises of the Citibank at 415 Broadway, N. Y., which is a federally insured banking institution. Further, plaintiff had deposited over $50,000 into his ckecking account, which moneys were the proceeds from his business in N. J. being used to pay bills reflecting decision by the U. S. Supreme Court and circuit courts.

Plaintiff went to the bank, as did the party designated as John Doe - the robber, due to the fact the bank was a federally protected banking institution, insured under policies recognizing its status as a banking institution. Nevertheless, the grand larceny took place in broad daylight, with the suspect, John Doe fleeing without security cameras (which were operating) or bank guards (who were present) capturing him - an impossibility for a busy banking institution at which one hundred people were in an area no larger than 25 feet by 50 feet. Plaintiff immediately notified the personnel at the institution of a robbery, with the security cameras fully operative. Plaintiff immediately called out "$3,000 in wrapped $20 bills have been stolen, Stop that man (John Doe, herein)."

COMPLAINT

I, Salvatore Moretti, by way of complaint in the within cause of action, do hereby declare as follows:

COUNT ONE

1. Plaintiff Salvatore Moretti has a checking account at the [2] Citibank Branch No. 11, 415 Broadway at Canal Street, New York, N. Y. 10013, and plaintiff opened this account over 12-months ago, in June, 1993.

2. Plaintiff regularly deposits receipts of his business into this checking account, which is identified as Account No. 0169**58*.

3. Plaintiff has deposited funds of over $50,000 in the past year, representing property rents, and regular monthly deposits were well known to the staff of the Citibank Bank.

4. Plaintiff is a well known customer of said bank, and uses their facilities since he is frequently in the neighborhood. Plaintiff makes use of the interior facilities of the bank; the bank appears to be well protected, through the use of thick plastic bullet proof screens next to the tellers' windows, television cameras, five automatic teller machines which require insertion of plastic bank cards with Personal Identity Numbers, numerous identitiy checks, guards, etc.

5. On August 8, 1994, plaintiff arrived at the bank in order to make his customary monthly deposit, but was the victim of a grand larceny inside of the bank, in full view of a large number of people, including the tellers, bank officers, guards, and television cameras, all of which have proved useless in securing the return of his stolen funds.

Wherefore, plaintiff claims in the amount of $5,000 for the grand larceny, and loss of wages and such proximate problems stemming [3] from the shortage of his checking account.

COUNT TWO

6. Plaintiff repeats the first five paragraphs of this complaint and incorporates them herein as if set forth in full.

7. Plaintiff entered the above denoted Citibank bank branch at 2:00 p.m. and was in the bank for a full ten

minutes at which time the grand larceny occurred.

8. The grand larceny occurred within less than twenty feet of all of the officers' offices, and was in clear view of all security personnel, suggesting that they were negligent in performing their duty of protecting customers on their way to deposit money, and while in the bank.

9. There is a line for depositors to stand on which zig-zags across the floor in order to produce more peoople waiting on line. Plaintiff stood not more than twenty feet from the front of the line waiting to make his deposit.

10. As soon as the grand larceny occurred, plaintiff called out that a robbery of three thousand dollars of wrapped bills had just occurred, in order to set off the surveillance cameras and to alert the security personnel, but with no response at all from any guard to stop the person who took the money.

11. As a result of the foregoing, the person(s) who took the money allegedly made a clean get away in the bank.

Wherefore, plaintiff claims for compensation as a result of the [4] grand larceny, in the amount of $2,000.

COUNT THREE

12. Plaintiff repeats the first eleven paragraphs of the complaint, as if set forth herein and at length.

13. Plaintiff was victimized by a well rehearsed grand larceny as a result of frequenting the bank and depositing moneys into the account. Plaintiff even noted that his account had been debited by $1,000 a short time before the

robbery as a result of what was supposed to be an error - in fact the money deducted was cash which had just been deposited into the account.

14. Plaintiff called for an investigation into the disappearance of this $1,000 of cash, as well as other similar disappearances of bank funds, but it apparently failed to alert the defendants on the problems occurring at the bank.

15. Plaintiff noted that there was a lack of uniformed security at the bank on August 8, 1994, but assumed that there were plain clothes guards at the site. In fact the money was stolen without any visible interference by the security personnel on site.

16. The lack of security at the bank was the proximate cause of the grand larceny. There has been no return of the money stolen, which consist of $7,168 in cash and $167.57 in checks.

17. When plaintiff inquired of the police, the FBI, the comptroller's office, the bank and its home offices, and various federal security services, they were unable to secure a return of the money, or meet with plaintiff to expedite discovery of the [5] person or persons responsible. At first, even photographs of the event were supposed to be unavailable.

18. Despite the attempts by plaintiff to secure relief, he was told that no one was responsible. He learned that while complaint no. 9430 was opened by the first precinct police department on August 8, 1994, the chances of getting plaintiff's money back were "zero". The bank alleged that they were not insured. The police department deferred to the bank which deferred to the police department, and the

failure of anyone to take charge of this investigation has resulted in consequential damages of not being able to pay bills in the amount of $7,336, which further caused liens on plaintiff's business, worth over $1,000,000.

WHEREFORE, PLAINITIFF claims damages in the amount of $7,336.00 for the loss of the entire deposit moneys.

COUNT FOUR

19. Plaintiff repeats the first eighteen paragraphs of this complaint and incorporates them herein as if set forth at length.

20. Plaintiff has sought the assistance of the first precinct police department (Detective Esserman, etc.) and the prosecutorial staff relating to the prosecuting of this case. Calls and/or visits have been made to the Citibank branch manager Tony D'Amico, with customer service of Citibank Corporation, with the Federal Bureau of Investigation in Manhattan, with the head of [6] security Bernard Flaherty from Citibank, with the Office of the Comptroller of the Currency, with the Headquarters of Citibank in Manhattan, and with all feasible agencies in charge of such matters, but to no avail.

21. Despite the foregoing, not one dollar has been returned. Also, no arrests have been made, and photographs have not been provided of the guilty party(s).

22. Repeated calls have been deferred to individuals who have stated that there will be no return of moneys, and no prosecutions will occur becuase of slip shod security, lack of preparation, etc.

23. Despite the passage of eleven days, no leads have been followed up, and no insurance agent from the bank or the banking department has offered to cover the losses. Plaintiff cannot afford to absorb these losses.

Wherefore, plaintiff claims against the Citibank for $3,000.

CERTIFICATION

I, Salvatore Moretti, am the plaintiff in this cause of action, and I hereby certify that the foregoing statgement made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

SALVATORE MORETTI

JURY DEMAND

Plaintiff demands a trial by jury of all of the fact issues of this complaint.

SALVATORE MORETTI

[7]

BRIEF SUBMITTED 11/22/94 TO JUDGE PATTERSON TO App. 58 AMEND COMPLAINT VACATE DISMISS-AL, TRIAL COURT DOCKET 94-6892(RPP) SUBMITTED TO EASTERN FEDERAL DISTRICT COURT, DOCKET 94-3944(CBA)

SALVATORE MORETTI, PRO SE
390 PARK STREET
HACKENSACK, NEW JERSEY 07601
(201) 646-1414

UNITED STATES DISTRICT COURT
Eastern District
Docket No. 94-3944 (DBA) [Amon]
Transfer Order Pending to: Southern District
Docket No. 94-6892 (RPP)[Patterson]

SALVATORE MORETTI,
Plaintiff

vs.

CITIBANK, N.A. BRANCH NO. 11, JOHN DOE, ET AL.,
Defendants

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT AND SET ASIDE THE ORDER DISMISSING THE FIRST COMPLAINT.

HON. ROBERT P. PATTERSON, J.U.S.D.C.
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

SALVATORE MORETTI, PRO SE
ON THE BRIEF

PLAINTIFF'S BRIEF TO AMEND COMPLAINT, ETC.

STATEMENT OF FACTS

Plaintiff Salvatore Moretti maintains a checking account at Citibank, N.A. Branch No. 11, Broadway at Canal Street, Manhattan. The account was opened on May 28, 1993. Mary Wing, Assistant Vice President at Citibank, opened the account on behalf of the plaintiff on that day using Moretti's $625.00 deposit. At this initial meeting, Mary Wing sat at her computer and checked into Citibank credit cards held by Moretti. She demanded credit card numbers from plaintiff. She discovered two Citibank credit cards under Moretti's name, and researched on her computer the activity in those credit cards, including balances outstanding, and daily activity.

Wing maintained daily contact with the bank statements of plaintiff, appearing each time plaintiff made deposits at the bank, and sitting at the desk which was next to an ATM machine in the rear of the bank. Plainitff's bank deposits of over $145,000 derived from his real estate investments in New Jersey. Plaintiff sought loans from Citibank, and discussions were entered into concerning the development of vacant land in Hackensack, New Jersey owned by the plaintiff. On February 25, 1994, an assistant manager discussed a personal loan with the plaintiff.

Not only was a loan denied, but an unwanted interest in plaintiff's checking account occurred. On three occassions, for example, plaintiff received notices stating that "because of an error in addition, there was a discrepancy between the amount shown on your deposit ticket and the actual amount credited to your accont. To correct this error, $---.- dollars has been deducted from your account. This adjustment

will appear on your statement with the description 'Deposit Error'. If you have any questions, please call a Customer Service representative ..." The amounts of the alleged discrepancy were $100 or over, and at times over $1200. These notices were despite the deposit tickets held by plaintiff showing the money was credited to his account. There was always a deduction to plaintiff's account, and the source of the error was never explained despite calls to the numbers listed on the notices. The dates of the notices of discrepancy were from May 18, 1994 to June 28, 1994.

Additionally, upon making deposits, men were stationed around plaintiff next to Wing's desk on at least five of the dates when he made his deposits - May 3, 1994, May 18, 1994, June 3, 1994, June 28, 1994, June 30, 1994, July 7, 1994, July 15, 1994, and finally August 8, 1994. These men on several occassions tossed money on the floor. The money appeared to be dropped by someone making a deposit. When plaintiff looked up, he saw various Citibank personnel gazing in his direction to determine what occurred. The men lingering around plaintiff were frequently six feet tall or over, often stocky men over 200 pounds, either black or white. They were in contrast to the bank customers standing on line. Plaintiff on two occassions placed his deposit back in his valise and picked up the money, only to discover that 15 or 20 singles has been thrown on the floor. He left this money on the desk assuming someone would return to claim it. On several occassions he immediately left the area to avoid trouble. On August 8, 1994, this procedure of throwing money on the floor was performed once again, when plaintiff arrived at 1:50 p.m. On August 8, the man stationed at Wing's desk walked off the platform, pushed plaintiff, grabbed the deposit, and attempted to make his escape. Plaintiff, upon seeing the pattern repeat itself, identified the man, called out that a robbery had occurred, and a

struggle ensued. (The bank has refused to release the film record of this robbery, preferring to claim that the only cameras operating at the time were at the entry to the bank.) Plaintiff served a subpoena upon the bank at Citibank, N.A., Subpoena Compliance Unit, 1 Court Square, Forty-First Floor, Long Island City, N. Y. 11120, att: Eileen Clancy. Citibank has refused to produce the subpoenaed videotape.) A bank patron standing at an ATM line informed plaintiff what occurred, another patron ran over to assist. The bank manager adevised plaintiff that the patron was interrogated, thinking him to be the robber, erroneously.

The police were called from an office at the bank. Despite plaintiff's description of the robbery to the police at 2:30 p.m., one-half hour after it occurred on August 8, 1994, no arrests were made. Complaint no. 9430 was opened by the first precinct police department on August 8, 1994; the chances of getting plaintiff's money back were stated to be "zero". The bank alleged that they were not insured. The police department deferred to the bank which deferred to the police department, and the failure of anyone to take charge of this investigation has resulted in consequential damages of not being able to pay bills in the amount of $7,336.

Citibank is a national association, chartered by the federal government. It is not registered in the state of New Jersey with the Secretary of State. It is registered with the Comptroller of the Currency in New York City. Its former name was First National Bank of New York. It changed its name to Citibank during the 1970's.

PROCEDURAL HISTORY

Plainitff filed the within complaint in U. S. District Court in the Eastern District of New York on August 19, 1994, by order to show cause. The Order to Show Cause was denied by Sterling Johnson, Jr., U.S.D.C. on August 19, 1994. Despite the filing in Brooklyn less than three miles from the Citibank Branch No. 11, N. A., the Eastern District Court sua sponte transferred the case to the Southern District one mile away by order of Carol Bagley Amon on August 31, 1994. On September 19, 1994, Citibank, upon receipt of the complaint, filed a motion to dismiss with the Eastern District Court. Plaintiff advised Sills, Cummis, et al. (On behalf of Citibank) the case had been transferred, and that plaintiff opposed the transfer. Whereupon, on October 4, 1994, Sills Cummis filed another motion to dismiss with the Southern District Court returnable on October 21, 1994. On October 21, 1994 plaintiff appeared in person before Judge Patterson to argue the motion, but Sills, Cummis failed to appear and the judge refused to procede without the other party present. Nevertheless, Hon. Robert D. Patterson, Jr. J. U.S.D.C. signed the order proposed by Sills Cummis with a memo endorsed thereupon reading that "motion granted. This Court does not have jurisdiction over this claim. The Federal Bank Robbery Act, 18 U.S.C. 2113, does not create a federal private right of action either expressly or by implication see Sadler v. Citibank, N.A., 947 F.2d 642, 643 (2d Cir. 1991), but is designed to protect the Federal Reserve Bank System and its member banks from robbery, Way v. United States, 268 F.2d 785 (10th Cir. 1959); Sadler v. Citibank, N.A. at 644. Furthermore, plaintiff's claim is for less than $50,000 and no diversity exists. Nothing prevents plaintiff from bringing his action in the courts of New York State. So ordered. The action is

dismissed and case closed. 10/31/94. Robert P. Patterson, Jr. U.S.D.J." This motion to amend the complaint and set aside the order of dismissal followed.

LEGAL ARGUMENT

POINT ONE

WHITNEY v. CITIBANK, N.A. 782 F.2d.1106 (2nd Cir. 1986). IS A CASE ON POINT WHICH HOLDS THAT THE CITIBANK KNOWINGLY VIOLATED ITS FIDUCIARY TRUST OWING TO A N. J. REAL ESTATE DEVELOPER AND SHOULD PAY COMPENSATION.

In the case of Whitney v. Citibank,. 782 F.2d. 1106 (2d.Cir. 1986), the court states at p. 1107 that the trial court entered judgment in favor of plaintiffs versus Citibank. Citibank, N.A. appealed from a judgment of the Southern District of New York. (bench trial before Chief Judge Constance Baker Motley, awarding compensatory and punitive damages against it in this diversity action). "The material facts are "the purpose of the partnership was to purchase and develop for residential apartment use approximately 11 acres of land with an abandoned factory, located in Edgewater, New Jersey, and known as the Alcoa property."

At. p. 1115: "Citbank does not question the well settled elements of a claim for inducing or participating in a breach of fiduciary duty. the claimant must prove (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damages as a result of the breach. The court notes at p. 1117, "the defendants' conspiracy of

silence and misinformation culminated in their wrongful backdating of the URO consent." In considering award of exemplary damages, the court notes that "the bank officers in this case...were vice-presidents vested by the bank's management with considerable authority in the handling of the bank's real estate matters."

The facts of the case at bar are similar to the Whitney case. Citibank, N.A. acted in a clearly illegal manner in deducting moneys from plaintiff's account, and in duplicitously withdrawing security from its bank, thereby endangering patrons. Citibank acted with every advantage of its powerful position, with computer assistance, and with scienter.

For this reason, the dismissal of the complaint at bar should be set aside.

POINT TWO

JUDGE PATTERSON'S BELIEF THAT AN IMPLIED PRIVATE ACTION IS NOT PERMITTED UNDER THE FACTS WITHIN IS NOT SUPPORTED BY THE COMPLAINT.

Gregory R. Mowe, in his Federal Statutes and Implied Private Actions, 55 Oregon Law Review 3, at p. 4, states that,

"The historical antecedent of implied private actions is the tort doctrine that violation of a criminal statute is negligence per se. A reasonable man obeys the law; one who violates a statute must be negligent. The negligence per se cases are distinguishable from private actions based on

criminal violations; in the latter case, a court is creating a cause of action rather than merely adopting a conclusive standard for an already existing common law cause of action. Nevertheless, early implied remedy cases relied on the negligence per se analogy without drawing the distinction. Subsequenty cases have extened implied remedies beyong statutes relating to negligence or standard of care, and even beyond criminal violations."

Mowe notes that the Restatement of Torts sets forth the elements of an implied cause of action:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:
(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
(b) the interest invaded is one which the enactment is intended to protect; and
(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests [sic] results from that hazard; and
(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action. Restatement of Torts Section 286 (1965).

Plaintiff filed a tort complaint, plus supplied a certificaton in support of the complaint arguing that a bank robbery occurred, that the elements of the offense were not only present in the thief, but that the internal policy making at Branch No. 11 suggested an embezzlement was taking place. As such, the federal tort claims act would hold that a federal complaint had been made out. The fact that a federal statute has been violated, and that this is a federally

chartered bank argues for jurisdiction in the federal district court.

POINT THREE

THE LAW OF BELL V. HOOD DECIDED BY THE UNITED STATES SUPREME COURT APPLIED TO THE CASE AT BAR SUGGESTS THAT THE DISTRICT COURT SHOULD FASHION A REMEDY TO RIGHT THE WRONG COMPLAINED OF.

In Bell v. Hood 327 U.S. 678 (1946), the Supreme Court was asked to recognize a private remedy on behalf of a plaintiff who asserted a violation of his fourth and fifth amendment rights by federal officers. The Court wrote, at p. 684, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

In this case, federal officials have acted so as to participate in an assault and battery and robbery, the very elements prohibited by the constitution, which affords individual rights. Since the robbery occurred inside a bank, the statutory pre-emption applies - there is no New York State statute dealing with bank robbery; it is a federal, not a state offense.

Plaintiff is clearly treated as if he was not robbed, since the statute only deals with robbery "of the bank." But the mere entry into the bank with intent to commit a felony is

treated as a a federal crime by the statutes. The thief did just that - he entered the bank with malice aforethought to rob the bank or to rob money being deposited in the bank with a deposit ticket about to be deposited. Plaintiff is a member of the class who is especially protected under these circumstances.

POINT FOUR

THE FAILURE OF THE BANK ACCOUNT TO ACKNOWLEDGE OF $1500 OF CASH DEPOSITED INTO PLAINTIFF'S ACCOUNT ESTABLISHES A PREPARATORY ACT TO THE PHYSICAL ACT OF ROBBERY ITSELF OCCURRING ON AUGUST 8. 1994

The case of Barbaro v. Citibank, N.A., 474 N.Y.S. 2d. 251 (N.Y. Cty. Civ. Ct. 1984) involved a similar fact pattern in which the defendant, Citibank, was sued due to refusal to accept a deposit made proven by a valid deposit ticket. The "action was brought to recover sum of $1,195.25 allegedly deposited to plaintiff's checking account with bank. The bank contended that plaintiff's deposit slip was not a valid receipt and refused to credit her account with that amount. The Civil Court of the City of New York, County of New York, David B. Saxe, J., held that: (1) a deposit slip is prima facie evidence that a bank received the sum stated on the slip; (2) if a bank wishes to shift burden of proving that a deposit slip meets the bank's requirements to the customer, bank must establish that customer was put on notice to check slip for the required information and (3) evidence, including fact that stamp on slip was made by type of machine used by bank, was sufficient to prive that slip was a valid deposit slip. Order accordingly.

POINT FIVE

JURISDICTION LIES IN THE FEDERAL DISTRICT COURT. BASED UPON THE RULES APPLCABLE TO A CONTROVERSY ARISING UNDER THE CONSTITUTION, UNDER THE FEDERAL STATUTES, AND FOR THE REQUISITE AMOUNT

In the case of State of N.Y. by Abrams v. Citibank, N.A., 537 F. Supp. 1192, "Attorney General for State of New York moved to remand action originaly brought under New York Executive Law. Case had been removed to federal district court by defendant bank. The District Court, Schaer, J., held that federal court had jurisdiction with respect to cause of action allegeing violations of the Electronic Fund Transfer Act [a federal statute]. Ordered accordingly. Note: Executive Law Section 63(12) empowers the Attorney General to seek injunctive relief, restitution, and damages for repeated or persistent fraud or illegality in the transaction of business. The Fraud alleged occurred at ATM machines where the thief told the bank patron the ATM was inoperative after he inserted the bank card, then observed his PIC number, and after the bank cutomer returned to the first ATM he was induced to re-insert his ATM there.

The decision notes at 1196. "The Supreme Court has held, however, that arising-under jurisdiction is not present merely because the case involves, or even turns upon, a federal question [cite omitted]".(at 1196), the Supreme Court held that, "to bring a case within [arising-under jurisdiction], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one

construction or effect, and defeated if they receive another, Gully v. First National Bank, 299 U.S. at 112..." at 1197: "Federal jurisdiction in this case is particularly appropriate, since EFTA will be construced here for the first time."

Plaintiff notes that the complaint alleged that he had a case pending in the United States Supreme Court, that the funds embezzled were in payment for debts owing as a result of decisions made in the federal courts, and that Citibank was well aware of these facts since it handled the checks to the federal courts for court fees for over one year. A city lien was placed for non-payment of real estate taxes on over $1,000,000 of real estate. Over $145,000 was deposited into the Citibank checking account. The robbery of $8,800.00 was a devastating loss to an individual who could not make up for the loss.

CONCLUSION

The dismissal without oral argument of the complaint within is violative of due process rights of plaintiff. As the cases cited show, federal courts have a responsibility to fashion a decision based upon the federal rights involved. Since the complaint was filed within eleven days of the robbery, plaintiff has had the opportunity to review the facts and determine that the complaint should be amended to reflect those facts.

Date: November 22, 1994
Submitted By:SALVATORE MORETTI,PRO-SE PLAINTIFF

CITIBANK'S OPPOSITION TO AMENDED COMPLAINT, FILED 12/1/94 U.S. DIST.CT. 94-6892(RPP)
App. 70

SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN, & GROSS, A PROFESSIONAL CORPORATION, 250 PARK AVENUE, NEW YORK, NEW YORK 10177-0040. (212)643-7000, FAX (212)319-0578

December 1, 1994

BY FEDERAL EXPRESS

Hon. Robert P. Patterson
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Salvatore Moretti v. Citibank, N.A.
Civil Action No. 94-6892 (RPP)

Dear Judge Patterson:

I submit this letter on behalf of Citibank, N.A. ("Citibank") in opposition to Mr. Salvatore Moretti's motion to file an amended complaint and to set aside the dismissal of his action. I requested and received permission from your Honor's chambers to file this opposition in letter format because of its promised brevity.

On November 1, 1994, the Court granted Citibank's Rule 12(b)(1) motion to dismiss. Despite plaintiff's arguments, the Court hold: 1) that there was no diversity jurisdiction; and 2) that subject matter jurisdiction was not coverred by the Federal Bank Robbery Act. On November 21, 1994, judgment was entered granting Citibank's motion

and dismissing the action in its entirety.

Unfortunately, Mr. Moretti has decided to continue his pursuit against Citibank in this Federal Court. On November 23, 1994, Mr. Moretti served a motion to file an amended complaint and to set aside the order dismissing the first complaint. For the following reasons, this motion should be denied in its entirety.

Plaintiff's motion apparently seeks 1) leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a); and 2) to alter or amend the dismissal judgment pursuant to Fed. R. Civ. P. 59(e). Notwithstanding his prayer for relief, plaintiff is not entitled to now seek leave to file an amended complaint. "It had been held that 'once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60 (b)." National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F. 2d 240, 244 (2d Cir. 1991)(quoting Cooper v. Shumway, 780 F.2d 27, 29 (10th Cir. 1985)); see also FDIC v. Chizner, 110 F.R.D. 114 (E.D.N.Y. 1986)(entry of judgment after defendant's summary judment motion was granted requird plaintiff to move for vacation of the judgment before seeking leave to amend the complaint). Since judgment was entered in favor of Citibank prior to plaintiff's instant motion, the motion must be treated as one exclusively for reconsideration or vacation of the judgment.

The standard for granting a motion to reconsider or vacate a judgment "is strict in order to preclude repetitive arguments on issues that have already been considered fully by the court." Farkas v. Ellis, 783 F. Supp. 830, 832 (S.D.N.Y. 1992). Such motions may be granted "only where

the court has overlooked matters or controlling decisions which might have materially influenced the earlier decision." Id. at 833; see also Caleb & Co. v. E. I. DuPont De Nemours & Co., 624 F. Supp. 747, 748 (S.D. N.Y. 1985)(citing New York Guardian Mortgage Corp. v. Cleland, 473 F. Supp. 409, 420 (S.D.N.Y. 1979).[Fn. 1]

---

1. Both Caleb and Cleland applied the above-described standard for reconsideration to Local Rule 3(j) motions. However, the standards that apply to Rule 3(j) motions to reargue also apply to Rule 59(e) motions to alter or amend the judment. Travelers Ins. Co. v. Buffalo Reinsurance Co., 739 F. Supp. 209, 210 n. 1 (S.D.N.Y. 1940).

Plaintiff's motion papers certainly do not meet the reconsideration standard. Plaintiff has raised no facts that have any relevancy to a subject matter jurisdiction determination. Moreover, plaintiff's "legal arguments" are nothing more than inapplicable, irrelevant, and convoluted case discussions. In addition to plaintiff's "substantive" arguments, he makes much of the fact that the dismissal was granted without oral argument. Of couse, the Court may, in its discretion, determine motions witout oral hearing. See Local Rule 3(i).

Accordingly, for the same reasons that the Court granted Citibank's motion to dismiss (i.e., no diversity because the $50,000 threshold not met; no federal question jurisdiction because the Federal Bank Robbery Act does not create a federal private right of action either expressly or by implication), Citibank respectfully requests that the Court now deny plaintiff's motion for reconsideration.

Respectfully submitted, Jeffrey M. Weinhaus

CITIBANK'S MOTION TO DISMISS, FILED 10/4/94 IN SOUTHERN DIST.FED.CT.94-6892(RPP) MOT-App. 73 ION GRANTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CITIBANK, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P.12 (B)(1).

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JEFFREY M. WEINHAUS, On the Brief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 94-6892 (RPP)

SALVATORE NORETTI,
Plaintiff
vs.
CITIBANK, N.A. BRANCH
NO. 11, JOHN DOE,
Defendants

Defendant, Citibank, N.A., ("defendant"), respecfully submits this Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1).

PRELIMINARY STATEMENT

Plaintiff Salvatore Moretti ("plainitff") has filed a com-

plaint with this Court alleging that defendant should be held liable because he was the victim of a "grand larceny" that allegedly took place while he waited on line at a Manhattan Citibank branch. Plaintiff assets that this Court has subject matter jurisdiction over his claim based on diversity of citizenship.[Fn. 1]

Fn. 1. Although it appears that plaintiff based his argument for subject matter jurisdiciton exclusively on diversity of citizenship, the complaint recites, in the paragraph entitled "JURISDICTION", that the robbery occurred at Citibank, "which is a federally insured banking institution." Complaint, p. 2. It is well-established that a claim brought against a federally chartered or insured entity which arised under state law (i.e., negligence) does not establish federal question jurisdiciton.`, Curiale v. Reissman, 798 F. Supp. 141, 145 (S.D.N.Y. 1992); Austin v. Altman, 332 F.2d 273, 276 (2d Cir. 1964); 28 U.S.C. Section 1348 ("All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located").

Plaintiff's allegation do not confer subject matter jurisdiction on this Court or on any other United States District Court. While plaintiff alleges that he and defendant are citizens of different states, the jurisdictional allegations and the specific prayers for money damages contained in the ad damnum clauses of the various counts are clearly insufficient to demonstrate that the amount in controversy "exceeds the sum of $50,000, exclusive of interest and costs." 28 U. S. C. Section 1332 (a). Read in a light most favorable to the plaintiff and allowing for what are ostensibly duplica-

tive prayers for money damages, the four counts of the complaints assert a maximum claim for damages in the amount of $17,336.00. Based on the substantive allegation of the complaint, it is clear to a legal certainty that plaintiff cannot recover sufficient damages to invoke federal jurisdiction. It is equally clear that the jurisdictional defect is irremediable and that plaintiff therefore cannot amend his complaint in good faith to satisfy the statutory amount in controversy. Accordingly, the Court should dismiss plaintiff's action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

STATEMENT OF FACTS

The complaint, annexed as Exhibit A to the Declaration of Joseph L. Buckley, although somewhat confusing, seems to allege that, on August 8, 1994, plaintiff was robbed of $7,336.00 while he waited to make his customary monthly deposit inside Citibank Branch No. 11, 415 Broadway, New York, New York. Complaint, Paragraphs 1, 5, 16. [Fn. 2].

Fn. 2. In count 2, plaintiff claims that he was robbed of $7,336.00. However, the complaint seems to indicate that a lesser amount was actually taken. For example, in count 2, plaintioff alleges that"[a]s soon as the grand larceny occurred, plaintiff called out that a robbery of three thousand dollars of wrapped bills had just occurred." Complaint, Par. 10.

While the alleged crime was perpetrated by an unknown robber, plaintiff has sued defendant based on its alleged lack of security at the bank which "was the proximate cause of the grand larceny." Complaint, Par. 16.

Plaintiff has commenced this action in federal court based on diversity jurisdiction. To support this basis of jurisdiciton, plaintiff asserts that defendant is a New York bank and plaintiff is a citizen of New Jersey. The complaint does not expresaly allege that the matter in controversy exceeds the sum of $50,000, exclusive of interest and costs. [Fn. 3]

Fn. 3. Apparently in recognition of the jurisdicitonal requirements, plaintiff does allege that he had deposited over $50,000 in his checking account. Complaint, p. 2. It is clear from the complaint, however, that plaintiff alleges no wrongdoing or loss with respect to this $50,000. Whatever the relevance of this allegation, it certainly had no significance to a determination of diversity jurisdiction.

Moreover, plaintiff's various prayers for damages do not amount to a value in excess of $50,000.

Plaintiff alleges the following specific damages as a result of defendant's lack of security: (1) 5,000, for the grand larceny, loss of wages, and "such proximate problems stemming from the shortage of his checking account" (Complaint, Count One ad damnum clause); (2) $2,000, for compensation as a result of the grand larceny (Complaint, Count Two ad damnum clause); (3) $7,336.00, for the loss of the entire deposit monies (Complaint, Count Three ad damnum clause); and (4) $3,000, apparently for defendant's alleged failure to return the money over a period of time (Complaint, Count Four ad damnum clause). Giving plaintiff the benefit of the doubt as to what appears to be duplicative demands, plaintiff's total claim amounts to $17,336.00.

ARGUMENT
THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PLAINTIFF'S COMPLAINT.

In order to establish federal subject matter jurisdiction based on diversity of citizenship, a plaintiff must allege that a) the plaintiff and defendant are citizens of different States; and b) the matter in controversy exceeds the sum of $50,000, exclusive of interest and costs. 28 U.S.C. Section 1332 (a)(1). The party asserting diversity jurtidiction in federal court bears the burden of establishing the existence of the jurisdictional amount in controversy. Lupo v. Human Affairs Int'l Inc, 28 F. 3d 269, 273 (2d Cir. 1994)(citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936)). In order to obtain such a Fed. R. Civ. P. 12 (b)(1) dismissal, "it must appear to a legal certainty from the complaint that the plaintiff cannot recover sufficient damages to invoke federal jurisdiciton." Zaccharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d. Cir. 1982).

Here, it is clear from the face of his complaint that plaintiff has failed to meet the burden of establishing the existence of the jurisdictional amount in controversy. Fn. 4

Fn. 4. Indeed, plaintiff has failed even to allege that the matter in controversy exceeds $50,000, exclusive of interest and costs. Notwithstanding this technical defect, however, a court may examine the entire complaint to determine whether the jurisdictional amount is in contropversy. Corcoran v. Royal Development Co., 35 F. Supp. 400, 401 (E.D. N.Y. 1940). In the instant action, an examination of the entire complaint reveals that plaintiff's damages are clearly not in excess of $50,000.

The complaint, read most liberally in favor of plaintiff, asserts a maximum claim for damages against defendant in the amount of $17,336. 00. As is more fully set forth in defendant's Statement of Facts, supra, this maximum figure is arrived at by adding together plaintiff's damage prayers in the four ad damnum clauses of his complaint. Thus, it appears to a legal certainty, that he cannot recover sufficient damages to invoke federal jurisdiction. See Givens v. W.T. Grant Co., 457 F.2d 612, 613-14 (2d Cir. 1972) (where plaintiff's claim for actual damages fell far short of the jurisdictional amount, it appeared to legal certainty that the amount in conrtroversy did not exceed statutory amount); Corcoran v. Royal Development Co., 35 F. Supp. 400, 401 (where it appeared from the complaint that the sole interestof the plaintiff was $1,400, court was justified in dismissing complaint based on lack of subject matter jurisdiction).

Moreover, it appears to a legal certainty that the jurisdictional defect is irremediable. Plaintiff's damages, allegedly resulting from a "grand larceny," are fixed money damages that include the amount allegedly stolen and, arguably, indicental damages resulting therefrom. Plaintiff has asserted these claims to the fullest extent possible and cannot, in good faith, amend his complaint to increase his claimed damages more than threefold in an attempt to satisfy the statutory amount in controversy.

CONCLUSION

For the foregoing reasons, defendant Citibank respectfully requests that this Court dismiss plaintiff's complaint based on its lack of subject matter jurisdiction over the action.

Dated: New York, New York, October 4, 1994

Respectfully submitted, SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN, & GROSS, P.A.; [(212)643-7000][Citibank, N.A.] By: Joseph L. Buckley, 250 Park Ave.,Suite 1200, NY,NY

App. 79

BRIEF FILED 3/8/'95 BY MORETTI

IN THE UNITED STATES C.A. 95-7060
COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALVATORE MORETTI,
Plaintiff-Appellant

- vs. -

CITIBANK, N.A., CITIBANK BRANCH NO. 11, MARY WING, AND JOHN DOE, ET AL.
Defendants-Respondents

CASE NO. C.A. 95-7060
D.C. NO. 94-6892 (RPP)

ON APPEAL FROM UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

SITTING BELOW:
HON. ROBERT P. PATTERSON,
J.U.S.D.C.

BRIEF BY:
PLAINTIFF-APPELLANT

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PROCEDURAL HISTORY

Petitioner filed a complaint in the Eastern District of New York in Federal Court on August 19, 1994, Salvatore Moretti v. Citibank, Branch No. 11, John Doe, et al., Docket No. 94-3944 (EAB)(App. 25). Petitioner sought expedited service of the complaint by order to show cause since he wished to secure the name(s) of the defendants, and to ascertain the underlying theories of recovery stemming from his robbery at the above noted bank eleven days prior on August 8, 1994 (App. 12). That order to show cause was denied on August 19, 1994 by Sterling Johnson Jr. U.S.D.J. (App. 13). The complaint was transferred from the Eastern District of New York to the Southern District of New York by order dated August 31, 1994 and signed by Carol Bagley Amon, U.S.D.J. (App. 9). The order states that the case was transferred due to the fact that the Citibank Branch No. 11 is located in the Southern District, just across the bridge from the Eastern District Federal Courthouse.(App. 9).

No answer was ever served by the respondent, Citibank, or any other defendant. Motion papers to dismiss were filed by Citibank (App. 70 - September 19, 1994; App. 71 and 75 - October 4, 1994, and App. 72 - December 1, 1994). On October 31, 1994, Robert P. Patterson, U.S.D.J. from the Southern District of New York, granted Citibank's motion to dismiss stating that the court "does not have jurisdiction over this claim. The Federal Bank Robbery Act 18 U.S.C. [Section] 2113 does not create a federal private right of action either expressly or by implication...but is designed to protect the Federal Reserve Bank System and its member banks from robbery." (App. 6-7).

Petitioner filed his first amended complaint, sounding in RICO, Tort, on December 8, 1994, and moved at that time

for an order setting aside the dismissal of the case for want of jurisdiction (App. 14). Citibank opposed the filing of an amended complaint. (App. 72).

Judge Robert P. Patterson denied the motion to set aside the dismissal and to amend the complaint on December 12, 1994 (App. 4), confirming the final judgment dismissing the complaint signed by James M. Parkison, Clerk of the Court, on November 19, 1994. (App. 8).

Petitioner filed his Notice of Appeal on January 9, 1995 with the United States Court of Appeals for the Second Circuit on January 9, 1995, DC 94-6892 (RPP), C.A. 95-7060.(App. 1-3).

FACTUAL HISTORY

On May 28, 1993, petitioner opend his account at the Citibank Branch No. 11, 415 Broadway at Canal Street, Manhattan.(App. 33). Between June 1, 1993 and August 8, 1994, Petitioner deposited $145,624.79, averaging $9,708.27 per deposit. (App. 33). On August 8, 1994, petitioner was the victim of a robbery within the branch. (App. 34). The person or persons responsible got away.

Mary Wing, Assistant Vice President of Citibank, N.A. opened petitioner's account in his behalf on May 28, 1993. (App. 15). At the initial conference she inspected petitioner's Citibank credit cards and checked his credit transactions on the computer screen in her office situated at the rear of the Citibank Branch No. 11. (App. 33).

Mary Wing was an assistant vice president at the branch and she was present when each of the deposits were made by petitioner. Her office was near the two ATM's at the rear of the branch,

opposite the teller windows. (App. 19). The deposits were from petitioner's real estate business with offices in Hackensack, New Jersey.

On February 25, 1994, an assistant manager discussed a personal loan with petitioner. (App. 33).

On June 28, 1994, petitioner made a deposit at the bank in which he deposited $1,250.00 in cash, plus five checks. (App. 33, 57). The bank notified petitioner that $1,250.00 was being deducted from his account because the "Check" for $1,250.00 was not received by the teller with the deposit ticket. In fact, each of the checks was one-half the size of the cash deposit, and the cash was actually received by the bank. Petitioner called for an investigation by the bank due to its deduction three times from May 18, to June 28, 1994 from bank deposit tickets stamped by the bank's own tellers, said deductions amounting to over $1,450.00. (App. 58). Petitioner made telephone calls to the investigations unit of Citibank, N.A. notifying the bank that petitioner was being cheated of his bank deposit.

At the same time, at unwanted interest developed when petitioner was making his deposits. Men were stationed around petitioner next to Wing's desk on at least five occassuons when he made deposits on May 3, 1994, May 18, 1994, June 3, 1994, June 28, 1994, June 30, 1994, July 7, 1994, July 15, 1994, and finally August 8, 1994.(App. 34). These men on several occassions tossed money on the floor. (App. 34). The money appeared to be dropped by someone making a deposit. When petitioner looked up, he saw various Citibank personnel gazing in his direction to determine what occurred. The men lingering around plaintiff were frequently six feet tall or over, often stocky men over 200

pounds, either black or white. They were in contrast to the bank customers standing on line. Plaintiff noted that the money on the floor consisted of fifteen to twenty singles. (App. 34). On several occassions petitioner immediately left the desk next to the ATM's at the rear of the bank, in order to avoid trouble. (App. 34).

On August 8, 1994, petitioner arrived at the Citibank Branch No. 11 at 1:50 P.M., carrying two bank deposit bags, one a green bag from Garden State National Bank (now known as First Fideltiy Bank), and one a blue bag from United Jersey Bank. (App. 57). There was a man stationed at Mary Wing's desk about twelve feet from the ATM's. At 2:00 P.M. petitioner noted that someone had once again thrown money on the floor where he stood. A number of (what appeared to be) plain clothes guards surrounded petitioner, and simultaneously the man stationed at Wing's desk walked toward petitioner and grabbed the bank bags, with the plain clothes guards acting as assistants to effectuate the get-away. (App. 34)

The bank has refused to release the film of this robbery, which would show the identity of the person(s) robbing the deposit. (App. 57). A subpoena which was sent to the Citibank Compliance Unit failed to produce any response. (App. 35). The police called to the scene from a bank office filled out complaint no. 9430 at 2:30 p.m. (App. 35).

Citibank is a national association, chartered by the federal government. It is not registered in the state of New Jersey with the Secretary of State. It is registered with the Comptroller of the Currency in New York City. Its former name was First National Bank of New York. It changed its name to Citibank during the 1970's.(App. 35).

The gravity of the loss of the within bank deposit was accentuated by the fact that petitioner was billed $8,000 for water for an apartment house in Hackensack, New Jersey. The taxes (including the water bill) on the apartment house was appealed to federal district court in Newark, whose decision was affirmed by the United States Court of Appeals. (App. 17). Liens for outstanding taxes were placed on petitioner's property (Assessed $1,000,000) consequent upon petitioner's failure to pay the bills for water and taxes. (App. 17).

POINT ONE
AMENDMENTS SHOULD BE FREELY GRANTED UNDER FED. R. CIV. P. 15

Fed. R. Civ. P. 15 specifically provides for amending of the complaint as follows:

Rule 15. Amended and Supplemental Pleadings.
"(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the actions had not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

In the case at bar, petitioner was never served an answer by the respondents. In fact, the respondents did not even telephone petitioner, relying instead upon filing a motion to dismiss with the wrong court, (the Eastern District of New York) after that court transferred the case to the Southern District of New York. Petitioner wrote to Citibank as follows on September 25, 1994 of that fact:
September 25, 1994
Clerk of the Court, & Judge Carol Bagley Amon, United States District Court, Eastern District of New York, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201

Re: Summons & Complaint, Moretti vs. Citibank N.A. Branch #11, Docket No. CV 94 3944; Motion to Dismiss served by Defendant, Citibank; Transfer order dated Aug. 31, 1994 (s) Judge Amon.

Dear Judge and Clerk of the Court:

"I am in receipt of several documents from Judge Amon and the defendant Citibank relating to the complaint filed [concerning a robbery occurring at the Citibank on August 8, 1994]...."

"Due to the failure of the defendant Citibank to contact me, they have submitted papers stating the matter should be dismissed as improperly filed in Broooklyn (venue), while your Honor has issued a change of venue order on the basis of 28 U.S.C., Sections 1391 (b) and 1406 (a). The venue problem should be addressed in briefs, since these statutory citations alone are not dispositive without oral argument and fact-based briefs...."

In fact, the case of Foman v. Davis treats of amendments holding that they should be freely granted. As noted in Moore's Federal Pracitce: 1994 Rules Pamphlet, Federal Rules of Civil Procedure, under Rule 15. Amended and Supplemental Pleadings, commentary, [at. p. 197]: "In Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962), the Court, citing Treatise, reiterated the philosophy of rule 15 that amendments of the pleadings are to be freely granted, even after a complaint has been dismissed. The court held it was error for the court of appeals to affirm the district court's denial of plaintiff's motion to vacate the judgment [p. 198] of dismissal for failure to state a claim in order to allow the complaint to be amended, since it appeared that the amendment would have done no more than

state an alternative theory of recovery(emphasis added). Said the Court: 'Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires"; this mandate is to be heeded. See generarally, 3 Moore, Federal Practice Paragraphs 15.08, 15,10 (ed ed. 1948). If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previosly allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.- the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opporttunity to amend is within the discretion of the District court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."
"See also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed. 2d 77 (1971)(prejudice must be taken into account by the trial court); ...Island Creek Coal Co. v. Lake Shore, Inc., 832 F.2d 274 (4th Cir. 1987)(refusal to allow an amendment of a complaint is an abuse of discretion even when a case has been pending for three and a half years, where the amendment is sought with reasonable promptness after new facts are known and no prejudice is demonstrated."

In the instant matter, the case was inititially filed on August 19, 1994, suggesting that eleven days after the bank robbery, the parties were not known, let alone the theories of recovery or liability. The complaint was filed with the proviso that amendments would be filed as soon as possible,

as stated at App. 12:

"I am proceeding on an expedited basis"..."I have endeavored to discover the name of the thief who stole my money in the Citibank Br. #11 on August 8, 1994, but have been unable to do so." Service was made by order to show cause (App. 13), but this was rejected on the day the complaint was brought to the Eastern District Courthouse, August 19, 1994. [Denied, So Ordered. Sterling Johnson Jr. U.S.D.J.].

Under the facts set forth above, the amendment of the complaint should have been allowed since there is no question of delay. The complaint had not been answered, no interrogatories had been answered, no discovery requests had been complied with (the videotape of the scene had not been seen, the videotape of the entry to the bank had not been sent to petitioner, the bank stated cameras of the robbery were blanked out).

POINT TWO.

THERE IS FEDERAL JURISDICTION UNDER 18 U.S.C. SECTION 1961, 1963, 1964 - THE RICO STATUTE- IN THE CASE AT BAR.

Judge Patterson states that the Federal Bank Robbery Act does not provide a private cause of action (App 7) [the act protects the banking system, not the patron, and further that once judment has been entered the court does not have authority to order the filing of an amended complaint [sounding in RICO, Tort].

Petioner maintains the complaint sets forth a federal cause of action. The original complaint as interpreted by the Eastern District of New York states that "plaintiff brings this action alleging grand larceny of his bank account." (App. 9). Grand larceny of over $1,000 is set forth at Count Three (App. 28) when his account had been debited by $1,000 a short time before the robbery as a result of what was supporsed to be an error. (App. 29). "John Doe" [the thief] is not accused of debiting petitioner's bank account by $1,450.00, Citibank is accused of that. (App. 25).

At issue is an "inside job" which continues in July and August, 1994 within the office of vice-president Mary Wing, out of whose office emerges the thief on August 8, 1994 at 2:00 p.m. This insider abuse is criminal misconduct which gives a private right of action, because the bank has robbed the patron.

Citibank is a national bank registered with the Comptroller of the Currency in New York. As such, the bank robbery complained of is a federal offense, with the federal court having jurisdiction. Such jurisdiction is explored in great

detail in the manner in which regulatory agencies act in this area. A law review dealing with this is Insider Abuse and Criminal Misconduct in Financial Instituions: A Crisis?, Notre Dame Law Review, Vol. 64: 222. [1989]. That law review states at p.222:

"Regulatory agencies are charged with protecting the safety and soundness of the banking industry. Despite those objectives, American financial institutions are currently failing at a rate higher than at any time since the 1930's. Today insider abuse and criminal misconduct contribute to a significant number of financial institution failures."
[p.226]. "A recent study by the Office of the Comptroller of the Currency refutes the claim that economic conditions cause many financial institution failures...[p.227]"economic conditions were the 'sole significant cause of failure' in just seven percent of the banks that failed." The OCC found that internal problems constituted the 'common denominator' amoung failed and problem banks. The actions and capabilities of a bank's management and board of directors appeard as the usual internal problems. Insider abuse was a significant factor in thirty-five percent of the bank failures; fraud had a similar effect on eleven percent of the failed banks."
[p. 230]: "Congress expanded the disciplinary powers of the banking agencies. Currently, the agencies possess the authority to pursue the following civil enforcement actions: formal agreements, cease and desisit orders, civil money penalties, suspendsions, and removals."

"Although some agencies have increased enforcement actions against individuals, all banking agencies have reduced the number of civil enforcement actions taken against institutions since 1984. The subcommittee in its 1988 Report recommended that all four federal agencies (OCC,

Federal Reserve, FDIC and FHLBB) 'substantially increase' utilization of civil enforcement actions against institutions. Several factors contribute to the continuing problems associated with civil enforcement actions against indivdiduals and institutions. Key policy disputes have led to the inconsistent use of certain types of civil [p. 233] enforcement actions. Collection of civil money penalties varies greatly among the banking agencies. The subcommittee also found that the heads of the federal banking agencies, particularly the FDIC and OCC, have failed to demonstrate a firm commitment to civil enforcement actions."

"In addition to civil enforcement actions, the FDIC and FSLC may pursue civil litigation against directors, officers and other individuals after a financial institution fails. Those suits are classified as 'recovery actions' or 'collection efforts' rather than enforcement procedures. [p.234] Agency suits against individuals often assert claims of common law fraud, negligence, breach of fiduciary duty, and violations of banking statutes and civil RICO. [Fn. See e.g. FDIC v. Antonio, 843 F. 2d 1311 (10th Cir. 1988); FSLIC v. Shearson-American Express, Inc., 658 F. Supp. 1331 (D. Puerto Rico 1987); FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985)(civil RICO suits [emphasis added]).

[p. 235] "Congress responded to the need for statutory improvement by enacting the bank related provisions of the Comprehensive Crime Control Act of 1984. That Act included a new statute concerning fraud against federally chartered or insured financial institutions. The fraud statute prohibits [p. 236] schemes to defraud those institutions and schemes to obtain money or property owned or controlled by such institutions. Prosecutors received additional authority to stop fraudulent schemes while an investigation

continues....In addition to banking statutes, prosecutors may use general federal statutes in cases involving criminal misconduct in financial institutions. Prosecutors continue to use federal statutes for mail fraud, wire [p.237] fraud, conspiracy, RICO [emphasis added], [Fn.] and other crimes."

[Fn. The Racketeer Influenced and Corrupt Organizations Act provides both criminal penalties and civil remedies for violations of its provisions. See 18 U.S. C. Sections 1963, 1964 (1982).

"RICO prohibits a person from engaging in activites which affect interstate or foreign commerce, including: (1) using income received from a pattern of racketeering to acquire an interest in an enterprise; (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering; (3) conducting or participating in the affairs of an enterprise throughi a pattern of racketeering; and , (4) conspiring to commit any of the abvove offenses".(Source: Burke, White-Collar Crime: Fourth Survey of Law, RICO, 24 Am Crim. L. Rev. 641, 657 (1987)] (emphasis added).

Civil RICO provides an appropriate private right of action for the acts described in the complaint. Petitioner argues that by amending the complaint, the trial court has no basis for denying trial on the merits.

POINT THREE

THE ACTS OF CITIBANK SET FORTH IN THE COMPLAINT VIOLATE THE STANDARD OF CARE, CARE, IN THAT THEY CONSTITUTE NEGLIGENCE PER SE, FOR WHICH A REMEDY AT LAW EXISTS.

Citbank alleges they cannot provide videotapes of the robbery scene [at the rear of the bank] despite the production of a subpoena to their "compliance unit." Petitioner suggests that such protographs would provide graphic evidence of the acts of the bank, as follows:

1. The Thief emerging from the office of Mary Wing, Vice-President of Citibank.
2. The Thief approaching the petitioner who is in possession of the bank deposit, conspicuously evidenced by two New Jersey bank bags, one from Garden State National Bank and one from United Jersey Bank.
3. The Thief grabbing the bank bags and attempting to make his get-away.
4. The plain-clothes guards converging on petitioner in order to effectuate the get-away.

On October 19, 1994, petitioner mailed by certified mail, No. P325 541 742, return recept requested, a letter to Citibank, N.A., Subpoena Compliance Unit, 1 Court Square, Forty-First Floor, Long Island City, N. Y. 11120. That letter demanded a copy of the videotape in re: Salvatore Moretti v. Citibank, Branch No. 11, John Doe, et al., Filed in the United Stated District Court in Brooklyn, on August 19, 1994, under docket No. Eastern District Docket No. 94-3944 (CBA) [Amon]; Transfer order pending to Southern District Docket No. 94-6892 (RPP) [Patterson]. The letter stated as follows: 14

"Enclosed find my subpoena for the preservation of evidence in the above captioned civil lawsuit. I filed suit in federal district court. I viewed the film of the Citibank Branch No. 11, 415 Broadway, New York, New York 10013 at Citi-Alert, 450 West 33rd Street (Sixth Floor), New York, New York. The video cassette contained still photos from cameras one and two [the entry to the bank with five ATM's], but excluded cameras three and four [which showed the interior of the bank where the robbery itself occurred at 2:00 p.m. on August 8, 1994.]"

"The enclosed subpoena is premised upon your statement that the cassettes are not kept unless notice arrives immediately. As noted the suit was filed eleven days after the robbery; the manager was notified immediately, the police arriving to investigate at 2:29 p.m. on August 8, 1994."

"While the video cassette from cameras three and four was excluded from my preview on October 17, 1994, these cameras recorded the most relevant film, the robbery itself; cameras one and two recorded only patrons walking into and out of the bank. The bank's allegation that cameras three and four were not presented may be based upon security reasons, but I maintain that such security was breached when the film depicts a federal bank robbery in which I was robbed."

The standard of care requires that when the bank has cameras in place, and the film is available, and the bank patrons demands copies of the film due to the above described robbery, the bank should provide the video cassettes. The Citibank has failed to honor that request. They have breeached the standard of care.

The standard of care as to photographing the scenes of robberies is discussed at 3 Am. Jur. Trials, Preparing and Using Photographs, Section 11. Robbery Scene. p. 355, as follows:

"The installation of concealed automatic cameras in banks is a fairly common praactice. Photographs taken may clearly record a robbery in progress, identify the perpetrator of the crime, or trace a bandit's movements subsequent to a holdup attempt..."

It is relevant here that in discussing the standard of care, courts have considered even the drastic case of a man shot in the bank during a hold-up. One such case is Nigido v. First National Bank, 264 Md. 702, 288 A.2d 127, 51 ALR3d 704. This case involved Salvadore Nigido and Josephine Nigido against the First National Bank of Baltimore, which case was appealed to the Court of Appeals of Maryland, March 9, 1972. The summary of decision provides the following:

"The plaintiff, a bank customer, brought an action in the Circuit Court, Baltimore County, Maryland, John N. Maguire, J., against the defendant bank to recover for injuries sustained in the course of a robbery on the bank premises. The complaint alleged that the bank was guilty of negligence because its camera and other protective devices were not functioning, because the building was not properly guarded, because the bank failed to take proper precautions to guard the building, and because, in view of the history of bank robberies at that location, robbery was foreseeable. The trial court sustained the bank's demurrer with leave to amend within 30 days, and awarded judgment to the defendant after the plaintiff failed to amend within the time

allowed. The plaintiff appealed.

The decision was affirmed by the Court of Appeals of Maryland..."

The decision states at p. 705-706:

"The appelants allege that in March, 1968, Salvatore went to the appellee's branch at 25h Street and Kirk Avenue in Baltimore to make a deposit and...that while he was there armed robbers entered and, in the course of accomplishing their nefarious purpose, they shot him 'about his body and limbs.' all 'without any fault or stimulation' on his part. Appellants averred that the appellee (bank) was guilty of negligence because 'its cameras and other protective devices were not functioning,' because the bank's building was not 'properly guarded' because the bank 'failed to take proper precuations to guard' its building, and because, 'in view of the history of bank robberies' at that location, the robbery was 'foreseeable." They alleged also that because the bank 'was in a fiduciary capacity' with its customer it had a 'special duty' to protect him 'against harm caused by robberies, particularly in view of the fact that...[it] was aware of this history of robberies.' Salvatore claimed $2,000,000 in damages; together the appellants claimed $200,000 for their loss of consortium. Following a hearing Judge Maguire, on 8 July 1971, sustained the bank's demurrer with leave to the appellants to amend within 30 days. For want of an amendment to their declaration a judment for costs in favor of the bank was entered on 27 August. This appeal followed."

" Appellants have not cited, nor have we found, any authority for the notion that the bank owed Salvatore 'a special duty' to protect him against robbers. We think he was an invitee to whom was owed the same duty a shopkeeper

owes his customer, i.e., to use reasonable care for his protection. Noll v. Marian, 347 Pa 213, 32 A2d18(1943)...But even if it could be said that the robbery was foreseeable it does not follow that the shooting of a customer was foreseeable."

p. 706.

"While the averment that the 'cameras...were not functioning' might be said to insinuate some sort of a negligent act or omission, it might as readily be consistent with the exercise of reasonable care. In some banks the cameras contain film which is exposed only when an employee closes a hidden switch; in others the cameras take pictures automatically at regular intervals during banking hours. In larger establishments there may also be found televisioon cameras which enable security officers to monitor activites in unsupervised areas. That the cameras 'were not functioning' while the robbers were in the bank does not mean, necessarily, that they were inoperative because of some negligent act or omission. Indeed, in some banks, so we were told, there are cameras that are nothing but dummies, set up like scarecrows 'to fear the birds of prey.'...

p. 707.

"The allegation that the bank's premises were not 'properly guarded,' and that the bank 'failed to take proper precautions to guard' them are clearly conclusions of the pleased, utterly unsupported by an averment of facts. The very nature of the banking business requires the maintenance of an area to which the bank's customers can come to transact their business. It would be difficult, perhaps impossible, for guards to filter the robbers from the hundreds of daily visitors to the premises. After all, robbers usually are reluctant to disclose the purpose of their visit until after they have entered the premises; until then they look like customers...It will be observed that appellants do

not allege a total absence of guards or a complete lack of any precautions. It is the failure to 'properly' guard, the failure to take 'proper precautions' to guard upon which they rely...If it is the rationale of the bank that armed guards might provoke gun-play and that it is better to lose cash than lives, then the total absence of guards would seem to be justified...."

p. 708

"In Altepter v. Virgil State Bank, 3345 Ill App 585, 104 NE2d 334 (1952), Altepeter, a customer of the bank, was shot during an armed robbery. The appellate court affirmed the granting of the bank's motion challenging the sufficiency of Altepter's elaborate complaint. The comment of Presiding Justice Dove, who delivered the court's opinon, is of interest:

"...It is not sufficient that the complaint allege a duty. The pleader must allege facts from which the law will raise a duty. The duty which the law raises from the facts alleged in these counts is that defendant must exercise ordinary care to safeguard the person of the plaintiff from injury while on its premises. No facts are alleged from which any one could conclude that defendant failed to take sufficient precautions to safeguard the plaintiff. The allegation that defendant failed to take sufficient precautions to safeguard the plaintiff is a conclusion of the pleader, and charging that the defendant 'negligently and carelessly' and [p. 709] 'wilfully and wantonly' failed to take sufficient precautions to safeguard the plaintiff are simply conclusions of the pleader. Good pleading requires that facts must be alleged from which the laws will raise a duty and facts must then be alleged showing an omission of that duty and resulting injury." 104 NE2d at 337."

At p. 710:

"We find appellants' failure to amend somewhat perplex-

ing. Counsel for the bank surely exposed the inadequacy of the declaration at the hearing on the demurrer before Judge Maguire...It is rare that a plaintiff's counsel cannot find some way to patch up the flaws in his declaration..."

It is evident from the foregoing that while the court in the Nigido case refuses to believe the bank violated the standard of care, the case against Citibank is distinguishable in that the bank claims to possess at least some videotapes (of the entry to the bank where late hours ATM's are located), yet it refuses to release even these videotapes. Further, the Citibank robbery includes deductions from petitioner's account by the bank itself [by refusing to answer the complaint, the respondent avoids admission of guilt from which the derivative guilt of John Doe may be inferred]. In addition, the Citibank received timely notice of the illegal deduction from his account of $1,450.00. Three notices were sent by Citibank at least two months prior to the robbery, and petitioner notified respondent that its deductions were improper. The actions of Mary Wing in allowing the thief to use her private office (one robbery attempt included throwing money at the foot of Wing's office), and the repeated throwing of money on the floor next to petitioner argue for a breach of the standard of care, since these are preparatory acts to the final successful robbery itself.

Finally, the Nigido court opines that counsel has failed to amend due to lack of a justiciable cause of action. In the instant matter, when petitioner amended,it was the court which refused to accept the amending, even though Citibank had yet to answer the complaint.

A New York court has defined the standard of care owing to bank patrons as follows:

The American Law of Torts, by Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, Vol. 9, 1992 (Clark, Boardman, Callaghan)

[p. 1099]. "[W]here a bank either knows or has reason to know from past experience that there is a likelihood of criminal conduct of third persons likely to endager the safety of a bank visitor, that bank is obliged to take all necessary protective measures and to provide a reasonably sufficient number of servants to afford reasonable protection. [Stalzer v. European American Bank (1982, N.Y. City Civil Ct., Queens Cty) 113 Misc. 2d 777, 448 NYS3d 631 at 634, 635 ("Given the very nature of a bank and their business it does and considering the many recent media-documented robbery attempts and completions, it seems reasonable to conclude that banking invites certain very real risks to the public at large. Whether the crime be one of random violence or a deliberate, planned attack, bank robbing seems to be a fact of every day life, committed by persons of all ages and by amateurs and professionals alike...This Court deems it necessary to make a few remarks about the proper standard of care for a bank to employ in providing safety and security for bank users. Although no precise line can be drawn, the standard would seem to lie somewhere mid-line betweren 'slight' and 'absolute,' that is, banks are required to exercise reasonable care and take reasable precautions to protect all categories of persons who come upon their premises."

POINT FOUR

THE STANDARD OF CARE WAS BREACHED BY CITIBANK IN THAT THE BANK IS LIABLE FOR VIOLATIONS IN RESPECT TO STATUTES COV ERING BANK ROBBERY AND EMBEZZLEMENT, AS WELL AS ASSAULT AND BATTERY.

The bank robbery which occurred at Citibank may not appear to be a crime in that it was cleverly conceived and executed. But the bank robbery statute was modified over fifty years ago to take account of the fact that bank robberies were becoming increasingly well planned. Consider the legislative history of the federal bank robbery statute itself:

Legislative History, Annotation Federal Bank Robbery Act. 59 ALR 2d. 946 at 952:

"The case of a man who stole a large sum of money but was not guilt of robbery because he did not display force or violence and did not put anyone in fear caused the statute to be redrafted. The bill introduced in the legislature made it a federal offense to enter any bank with intent to commit any felony or larceny."

"The present statute was passed 1948, known as 18 U.S.C. Section 2113. It is substantially the same as the former 12 USC Sections 588 (a), 588(b), and 588 (c).

[p. 954.] "The Federal Bank Robbery Act was originally enacted in 1934 to combat effectively the ever-increasing number of interstate bank robberies with which local au-

thorities were frequently unable to cope."

Note that from 1948 to 1992, the same statutory citation remains. 18 U.S.C. Section 2113, known as the federal bank robbery statute. This statute gives jurisdiction to the federal courts. Note the following discussion in Am. Jur.:

67 American Jurisprudence 2d Section 92, V. Federal Statutes [Sections 92-130], A. Bank Robbery Act, 1. In General; Offenses Under The Act [Sections 92-101]

"The Federal Bank Robbery Act, referred to herein as the Act, was originally enacted in 1934 to combat interstate bank robberies. In 1948, Congress passed the present statute."[18 USCS Section 2113]

"The institutions protected by the Act are banks, credit unions, and savings and loan associations, defined in the statute as institutions that are organized under Federal law, that are parts of a federal system, or that are federally insured.[18 USCS Section 2113(g) -(h)] The Act deals with robbery or attempted robbery of such institutions and entering or attempting to enter them with intent to commit a federal felony affecting them, or any larceny affecting them, or any larceny...."

"The Act authorizes more severe penalties for persons who, in violating the robbery, unlawful entry, or theft provisions of the statute, assault anyone, or jeopardize anyone's life by the use of a dangerous weapon or device. A high minimum penalty is provided for any person who, in committing any offense defined in the Act, or in attempting to avoid apprehension or to escape from arrest or confinement for such offense, kills or kidnaps any person."

"The Act as a whole, and its main provisions, have re-

peatedly been upheld as constitutional against various attacks, such as lack of power in Congress to protect state banks, to make murder and kidnapping a crime, or to make bank robbery and murder committed as incident thereto separate crimes. The Act has also withstood claims that it was invalid because it provided a penalty greater than that provided for similar offenses, and arguments that it interferes with the exercise of the police powers of individual states, and fails to require that the bank robbers have used instrumentalities of interstate commerce in committing the robbery..."

"The Bank Robbery Act makes it a federal offense when anyone, by force or violence, or by intimidation, takes, or attempts to take, from the person or presence of another anything of value belonging to a protected institution or presence of another anything of value belonging to a protected institution or in its care, custody, control, management, or possession...."

Section 100 Aiding and abetting commission of a bank robbery; accessory after the fact.

"One who aids and abets the commuission of a bank robbery, or an attempted bank robbery, is liable under the Federal Bank Robbery Act, because the general statutory provision directing that whoever aids or abets the commission of an offense against the United States is punishable as a principal applies to the entire criminal code."

"Clearly, Citibank is guilty of violating the bank robbery act since it is an accomplice. The standard fo care is set forth in the statute itself which states as follows:"

18 U.S.C. Section 2113. Bank Robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes. or attempts to take, frrom the person or presence of another, or obtains or attempts to obtain by extortion from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building , or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the united States, or any larceny -

Shall be fined not more that $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value

not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this seciton, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free, himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of

the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal Credit Union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

Historical and Revision Notes:

Based on sections 588a, 588b, 588c, of Title 12, U.S.C., 1940 ed., Banks and Banking (May 18, 1934), c. 304, Sections 1, 2, 3, 48 Stat. 782; ...as amended Oct. 12, 1984, pub. L. 98-472, Title II, Section 1106, 98 Stat. 2145...Nov. 29, 1990, 104 Stat. 4911.)

The above statute must be read in conjunction with the federal statute dealing with embezzlement by bank officer, to wit 18 U.S.C.A. Section 656. Theft, embezzlement, or misapplication by bank officer or employee:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution, holding company, national bank, insured bank, branch or agency of a

foreign bank, or organization operaing under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both: but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section , the term "national bank" is synonymous with "national banking association"; "member bank" means and included any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title.

(As amended Aug. 9, 1989, Pub. L. 101-73, Title IX, Section 961(b), 103 Stat. 499; Nov. 29, 1990, Pub.L.101-647,Title XXV, Section 2504(b), 2595(a)(1), 2597(f), 104 Stat. 4861, 4906, 4909.)

From the foregoing, we can determine that two major statutes exist dealing with the standard of care, and that both statutes have taken away from the state court their primary enforcement. The evolution of the statutes suggest that uniform federal prosecution is preferred to state prosecutions.

Petitioner argues that there is a private right of action even under the original complaint as filed, given the circumstances set forth herein. Arguing for such a belief is Tamar Frankel in the Virginia Law Review, Vol. 67:553, Implied Right of Action.

AT P. 555,
'Historically, courts have justified the implication of private causes of action on the grounds that a prohibitory statute may create a right in the plaintiff, and that if the defendant breaches that right and injures the plaintiff, a right to compensation follows automatically. In Texas & Pacific Railway v. Rigsby, the 1916 case generally credited with originating the federal doctrine of implication, the Supreme Court wrote:

'A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed ...in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statue for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." This is but an application of the maxim, 'Ubi jus ibi remedium' [Where there is a right,

there is a remedy.]

"The traditional focus, then, is on the plaintiff's right to obtain (p. 556) compensaiton for 'a wrong done to him.'"

POINT FIVE

THE TRANSFER OF THE WITHIN CAUSE OF ACTION FROM THE EASTERN DISTRICT OF NEW YORK TO THE SOUTHERN DISTRICT OF NEW YORK IS IMPROPER UNDER THE FEDERAL STATUTES.

Petitioner at all times has maintained that transfer of the within cause of action was improper. Respondent Citibank did not even answer the complaint, suggesting its only concern was to have the complaint dismissed, rather than transferred.

Petitioner wrote to Judge Amon as follows:

September 25, 1994

Re: Summons & Complaint, Moretti vs. Citibank N.A. Branch #11, Docket No. CV 94 3944; Motion to Dismiss served by Defendant, Citibank; Transfer order dated Aug. 31, 1994 (s) Judge Amon.

"I am in receipt of several documents from Judge Amon and the defendant Citibank relating to the complaint filed [concerning a robbery occurring at the Citibank on August 8, 1994]....The venue problem should be addressed in briefs, since these statutory citations alone are not dispositive without oral argument and fact-based briefs...."

The basis for petitioner's objection is that the venue statute itself provides that venue lays in the Eastern District with the federal court where the complaint was filed on August 19, 1994. Note the statute itself,

28 U.S.C.A. Section 1391. Venue Generally

(a) A civil action where jurisdiction is founded only on diversity of citizenshp may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is not district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenshp may, except as otherwise provided by law be brought only in (1) a judicial district where any defendant resides if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to person juris-

diction if that district were a separate State, and , if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts. (emphasis added).

Note the following commentary on the purpose of the relevant section of the statute:

Part IV - Jurisdiction and Venue. Chapter 87 - District Court; Venue. Commentary on 1988 and 1990 Revisions of Section 1391 by David D. Siegel (p. 7, and following.)

"Section 1391 is ...the basic venue statue, determining what district or districts an action may be brought in. Extensive changes were made in the section in 1988 and 1990, affecting subdivisions (a), (b), (c), and (e).

"Section (c), the provision governing the venue of actions against corporations, was amended in 1988 in the Judicial Improvements and Access to Justice Act (Pub.L. 100-702)...

Subdivision (c)

Background of 1988 Amendment

"The old subdivison (c) allowed venue in an action against a corporate defendant to be laid in the corporation's district of incorporation or in any district in which it was licensed to do business or actually doing business. The view on which 'Congress acted in amending the sudivision was apparently based on the "licensed to do business" segment of the old statute: since a corporation that duly licenses itself under state law is authorized to do business anywhere in the state, the "licensing" standard would, in a state with several districts, X, Y, and Z, make any district in that state a proper venue in an action against a corporate derfendant even if all of the corporation's activities were in X district alone. It was this alternative that Congress, citing a Judicial Conference recommendation, sought to eliminate with the 1988

amendment. (See Representative Kastenmeir's Report in behalf of the House Judiciary Committee [Rept. 100-889, Augusut 26, 1988, page 701.])...Subdivision (c) now provides that the corporation is to be deemed a resident of any judicial district in which 'it is subject to personal jurisdiction at the time the action is commenced'. This means that anything that would make the corporation amendable to jurisdiction in that district, or permit extraterritorial service of the court's summons under any of several well-known tests, would ipso facto make that district a proper venue as well. A corporate 'doing business' test is one such test. A showing that the corporation is regularly doing business in the district subjects it to the personal jurisdiction of the courts there and hence makes that district a proper venue in an action against the corporation. (See Commentary C4-28 on Rule 4 of the Federal Rules of Civil Procedure in the 28 U.S.C.A. set.)...If the corporation is doing regular day-to-day business in Y and Z, but not X, then the defendant is amendable to jurisdiction, and is therefore deemed to have its residence, in Y and Z, but not X.

In the case at bar, Citibank N.A. operates in Brooklyn, as well as in Manhattan as the listing of the Brooklyn bank locations proves at App. 63.

CONCLUSION

FOR ALL THE REASONS SET FORTH IN THE FOREGOING, PETITIONER SEEKS THE REVERSAL OF THE TRIAL COURT ORDERS AND RESTORATION OF THE CASE TO THE TRIAL CALENDARS OF THE SOUTHERN DISTRICT AND EASTERN DISTRICT FEDERAL COURTS OF NEW YORK.

Date: March 8, 1995

Submitted By: _____
Salvatore Moretti
Petitioner Pro Se

MORETTI'S REPLY BRIEF FILED 5/5/95
IN U.S.COURT App. 124 OF APPEALS,SECOND
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POINT ONE

ALTHOUGH CITIBANK ALLEGES THE ORIGINAL COMPLAINT AS FILED AUGUST 19, 1994 IS INADEQUATE, ITS OPPOSITOIN TO THE FILING OF THE AMENDED COMPLAINT LACKS CLARITY OR MEANING.

Leaving aside for the moment the question of the adequacy of the original complaint filed August 19, 1994 - eleven days after the robbery - petitioner wonders at the objection of Citibank to the filing of the amended complaint. For example, the respondent relies upon Twohy v. First National Bank, 758 F. 2d 1185 (7th Cir 1985) for the proposition that in the post-judgment situation filing of an amended complaint is less advisable than in the pre-judgment situation (Brief p 13). Citibank then suggests that reliance upon Fed. R. Civ. P. 15(a) and Foman v. Davis, 371 U.S. 178 (1962) is not correct because "the case at bar is simply not a 'proper case'." Since the brief abruptly ends on p. 15, Citibank fails to elaborate on this point, but it is worth looking briefly at this argument.

Philip Twohy was a shareholder of Bevco, a Spanish corporation. Twohy filed suit on August 14, 1981 against First National Bank, N.A. with its principal place of business in Chicago, Illinois. The defendant bank filed an answer - note that Citibank never filed an answer to either of petitioner's complaints. On April 2, 1982, eight months after the filing of Twohy's complaint, First National filed a motion for judgment on the pleadings. Depositions had already been taken. Twohy answered the motion for judgment on August 20, 1982. On June 3, 1983 the court granted defendant's motion for judgment on the pleadings. The judgment order was not entered until July 1, 1983 in favor of First National and against Twohy. Note the time frame involved. Two years after the filing of Twohy's complaint, it was dismissed. By comparison, Judge Patterson dismissed

petitioner's complaint October 31, 1994 (73 days after it was filed), and judgment was entered November 17, 1994 (17 days later). Twohy sued on behalf of his corporation, while such suit should have been brought in the name of the corporation. Hence, the problem was that Twohy failed to state how he would amend his complaint to correct this problem. Twohy failed to supply an amended complaint along with his Fed. R. Civ. P. 15(a) motion. Note by contrast that petitioner filed an amended complaint on December 8, 1994 (App 24), the return date on the motion to set aside the judgment. Note that Judge Patterson acknowledges petitioner's presence on that date (App. 5). Judge Patterson's decision is particularly unilluminating, reading as follows: "Nothing plaintiff said on that occasion or in plaintiff's motion papers is of a nature to cause the Court to reconsider its original decision to dismiss the complaint or to vacate the judgment herein pursuant to Rule 59(e) or 60(b). The Court does not have authority to order the filing of an amended complaint once judgment has been entered. Accordingly the motion is denied." (App. 5).

Clearly, Citibank's reliance upon the Twohy case is misplaced, in that after two years, Twohy still had not submitted his amended complaint, while petitioner moved to amend his complaint two months after the September 21, 1994 dated summonses were prepared by the Southern District. Note the language of the court in the Twohy case:

p. 1187. "Defendant filed an answer denying all material allegations of the complaint and setting forth the following defenses: 1) plaintiff as a private person and shareholder lacked 'standing' to assert a claim for the recovery of damages in contract or tort arising from an alleged transaction of a corporation of which plaintiff was a shareholder, 2)plaintiff did not plead actionable fraud, libel or a corpo-

rate contract on which a private plaintiff could rely, or facts supporting a punitive damages claim, and 3) the fraud, misrepresentation and libel claims were time-barred." (emphasis added).

at p. 1189
"The court [below] stated that since the 'insufficiency of the Complaint [was] one of law, and not of fact,' and since Twohy had not tendered an amended complaint, judgment would be entered. (R. Item 67.)"
"Plaintiff filed a timely motion to amend the judgment to allow the filing of an amended complaint purusant to Rule 59(e), Fed. R. Civ. P., but did not proffer an amended complaint with the motion. Neither did the plaintiff indicate the exact nature of the amendments proposed (other than that they would be offered 'to meet the objections stated by this court to the original complaint') (R. Item 68), nor did he furnish the court with any reason why the amended complaint could not be filed (Plaintiff's Br. 10). On the same day defendant filed objections to the plaintiff's motion, asserting that Twohy's failure to submit the proposed amended pleading within the six weeks following the court's verbal announcement of its ruling was 'dilatory' and that there was no good reason to delay the proceeding further (R. Item 69)."

The decision note at p. 1196 that "several courts have recognized that justice may reqiure something less in post-judgment situations than in pre-judgment situation under Rule 15(a), and have denied post-judgment leave to amend soley on the basis of unreasonable or unexplained delay where plaintiff had earlier opportunities to present amendments."(emphais added)

p. 1197: "Plaintiff Twohy's intransigence in presenting his amendment was peculiarly unreasonable and inexplicable

and is indistinguishable from the facts of Oremus. We, therefore, can in no way characterize Judge Leighton's refusal to allow amendment as an abuse of discretion. Over twenty-two months elapsed from the time this suit was commenced to the time the court entered judgment for the defendant - time in which Twohy could have presented his amendments (emphasis added). Twohy also failed to tender an amended complaint or request leave to amend during the nearly one-month period between Judge Leighton's June 3, 1983, announcement of his decision to grant defendant's motion to dismiss and the judge's ultimate entry of judgment on July 1. More significantly, plaintiff failed to file an amended complaint with his July 15 Rule 59(e) motion to amend the judgment order and request for leave to file an amended complaint....While we do not seek to require that an amended complaint always be tendered with a Rule 15(a) motion to amend, such a failure certainly indicates a lack of diligence and good faith, particularly under these circumstances."

Petitioner affirms that he did submit an amended complaint on December 8, 1994, the return date of the motion filed November 22, 1994 to vacate the judgment and amend the complaint. Citibank's brief admits at p. 5 that "On November 21, 1994, judment was entered dismissing the action in its entirety - App. at 8. On or about November 23, 1994, plaintiff served a motion for leave to file an amended complaint and to amend or alter the order dismissing the first complaint - App. at 32. Further, the issue of which court had jurisdiction, the Eastern District or the Southern District made difficult appearances on return dates, when Citibank filed motions to dismiss in both districts even before answering the complaint. The transfer from the Eastern District to the Southern District inflates the time from filing to dismissal by over 12 days, the south

ern district preparing summonses dated September 21, 1994.

As a consequence of the above misunderstanding generated by Citibank, the issue of the relating back in time to the filing of the first complaint is missed. It is obvious that petitioner sought to relate back the second complaint to the time of the original complaint, but for the failure of Citibank to disclose the nature of the action. Since petitioner was the victim of an assault and battery in respondent's bank, as well as a victim of a bank robbery, he waited until seeing the video camera pictures to amend his complaint. This is a classic case of the amended complaint relating back to the time of the filing of the original complaint. By relating back in time, the issue of the dismissal of the complaint is not before us. Since Citibank jumps to the conclusion that the case has proceeded to judgment, it then states that the instant case is not a proper case for consideration of the rule of Foman v. Davis or Fed. R. Civ. P. 15(a). Given that Citibank's reliance upon Twohy is erroneous, further consideration must be given to the colurt rule governing amended complaints.

Rule 15 states as follows:

Rule 15. Ameded and Supplemental Pleadings.

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or

within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders (emphasis added).

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence (emphasis added).

(c) Relation Back of Amedments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, (emphasis added) or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by

Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party...

Clearly, the rule states in section (b) that "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment..." Even after trial, amendment of the pleading is allowed by rule of court upon motion.

As to the issue of the amended complaint filed December 8, 1994 relating back to the filing of the original complaint on August 19, 1994, consider also that the defendant has failed to prove prejudice.

Nothing is stated in the amended complaint which is not already in the original complaint. The original complaint states that the robbery took place in the bank at 2 p.m. on August 8, 1994, and that it was well rehearsed, suggesting that the get-away went smoothly despite the presence of a number of bank patrons. The original complaint states at App. 29 that "there was a lack of uniformed security at the bank on August 8, 1994. ..In fact the money was stolen without any visible interference by the security personnel on site. The lack of security at the bank was the proximate cause of the grant larceny." Mary Wing had been advised as to the coming and going of the petitioner because her office was at the rear of the bank facing two ATM's and four feet from the desk at which petitioner frequently stood as he got onto line. The first complaint states that "plaintiff was victimized by a well rehearsed grand larceny as a result of

freqenting the bank and depositing moneys into the account. Plaintiff even noted that his account had been debited by $1,000 a short time before the robbery as a result of what was supposed to be an error - in fact the money dedeucted was cash which had just been deposited into the account. Plaintiff called for an investigation into the disappearance of the $1,000 of cash, as well as other similar disappearances of bank funds, but it apparently failed to alert the defendants to the problems occurring at the bank. Looking on all the time was Mary Wing, who was at the bank during each deposit. The amount of the deposit averaged over $7,000, and the sum of money stolen on August 8, 1994 was over $7,000. Over $145,000 had been deposited into the bank, and the bank produced monthly statements to that effect each and every month from May, 1993 (when Mary Wing opened the acount for petitioner) to August, 1994.

Since Citibank relied upon the entry of judgment, it misread the Twohy court and assumed that judgement forecloses amendment of pleadings. Neglecting to distiguish Twohy, it then fails to address Fed. R. Civ. P. 15(a),(b), or (c), and assumes the case at bar not to be a proper case.

Consequently, Citibank assumes that the case of Foman v. Davis does not apply. In Foman, the complaint was dismissed because the theory of recovery was an oral promise made relating to inheritance of an estate. Foman sought to amend her theory of recovery to the theory of quantum meruit - she had taken care of her mother in accord with her father's desire. When the appellant appealed the trial court decision to the Court of Appeals for the first circuit, that court "affirmed denial of petitoner's motions, on the ground that there was nothing in the record to support a finding that the district Court had abused its discretion in refusing to allow amendment of the complaint." The Court

of Appeals decision is at 292 F. 2d 85. On appeal to the Supreme Court, the decision below was reversed. The Supreme Court summarizes the facts as follows at p. 179, "Petitioner filed a complaint in the District Court alleging that, in exchange for petitioner's promise to care for and support her mother, petitioner's father had agreed not to make a will, thereby assuring petitioner of an intestate share of the father's estate; it was further alleged that petitioner had fully performed her obligations under the oral agreemewnt, but that contrary thereto the father had devised his property to respondent, his second wife and executrix. Petitioner sought recovery of what would have been her intestate share of the father's estate. Respondent moved to dismiss the complaint of the ground that the oral agreement was unenforceable under the applicable state statute of frauds. Accepting respondent's contention, the District Court entered judgment on December 19, 1960, dismissing petitioner's complaint for failure to state a claim upon which relief might be granted. On December 20, 1960, petitioner filed motions to vacate the judgment and to amend the complaint to assert a right of recovery in quantum meruit for performance of the obligations which were the consideration for the assertedly unenforceable oral contract. ...On January 23, 1961, the District Courty denied petitioner's motions to vacate the judgment and to amend the complaint. On January 26, 1961, petitioner filed a notice of appeal from denial of the motions..[181]The Court of Appeals' treatment of the motion to vacate as one under Rule 59(e) was permissible, at least as an original matter, and we will accept that characterization here."

The decision of the Supreme Court follows: [181] "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game

of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48. The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action. Rule 1.' [182] "The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery"(emphasis added).

"Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), Paragraphs 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc., - the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

"The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion."

This opinion stands for the proposition that the rules of civil procedure require trial on the merits. Citibank is trying to use its technical interpretaiton of the rules to avoid trial on the merits. The facts speak to a robbery, or series of robberies and embezzlements. Money is being deducted from petitioner's account by Citibank. The most foreceful deduction comes when a thief exits from Mary Wing's office and steals two bank deposit bags containing over $7,000 in cash. Citibank reasons that there is not diversity - that the largest bank doing business in New York with its principal office in New York does not have diversity with its New Jersey bank patron. Alternately, it reasons that if there is diversity, petitioner cannot amend to state a cause of action of over $50,000, when he operates real property which generated the $145,000 deposited into Citibank. Citibank's reasoning is mis-leading, and contrary to the facts. The robbery of $7,000 of cash can and did result in liens placed on real property due to non-payment of taxes, and judgment. Stays applied for in the Supreme Court failed to overturn required payments for water consumed by petitioner's residential apartment building amounting to over $20,000. Water, real estate tax, and utilities amount to over $50,000. Non-payment of any of these can (and did) result in health violations, and liens.

Citibank did not make discovery, did not answer the complaint. Amendment should be allowed on that basis alone. If in addition, Citibank fails to discern how its acts injured petitioner, that is not basis for its motion to dismiss. Rather, it is basis to wonder whether Citibank is concerned about the welfare of its patrons, being a large bank. Citibank may have been unconcerned when petitioner was robbed in its Branch No. 11 on Brandway in lower Manhattan. Despite that fact, the legal issues are under the Citibank owed a duty of care, and as a result of the breach of that duty, a federal crime was committed.

POINT TWO

CITIBANK'S RELIANCE UPON THE WRIGHT AND MILLER'S FEDERAL PRACTICE AND PROCEDURE IS INAPPOSITE, AS THE CASES CITED THEREIN FAVOR PETITIONER UNDER ANALOGOUS FACT PATTERNS.

Citibank's answering brief criticizes the appendix provided by petitioner, and calls his legal arguments "nothing more than inapplicable, irrelevant, and convoluted case discussions (Br. p 7)." Continuing, Citibank claims petitioner's appellate brief "does not allege in any intelligible way that the district court overlooked issues, facts, or controlling decisions that might have had a material influence on the underlying decision (Br. p 7-8)." Citibank further states, "it appeared to a legal certainy that the jurisdictional defect was irremediable. Plaintiff's damages, allegedly resulting from a 'grand larceny,' were fixed money damages...Plaintiff ...could not, in good faith, amend his complaint to increase his claimed damages more than threefold in an attempt to satisfy the statutory amount in controversy. Plaintiff does not present any argument in support of diversity jurisdiciton in his appellate brief (Brief P.9)."

Citibank's Corporate Disclosure Statement (Br. p. 1) present Branch No. 11, Citibank N.A., and Citicorp as a world-wide institution. Citibank is identified as a subsidiary of Citicorp, which is a corporation whose stock is publicly held. Petitioner alleges that the two treatises named Citibank discussed at point four prove that Citicorp has as it principal place of business New York. Given petitioner's New Jersey citizenship, diversity is proven. Given that petitioner sued in federal court during the pendency of three cases in the United States Supreme Court suggests that the robbery of over $7,300 involved a shortage in disposable

cash when liabilities of operating a million dollar real estate company result in liens threatening petitioner's solvency. In fact, water, a sine qua non of residential apartments, had been shut off due to a $20,000 outstanding water bill during the pendency of litigation - sanctions were applied due to health violation. Citibank does not understand this since no discovery was sought on this point; its arguments are irrelevant and immaterial. both as to amount in controversy as well as subject matter jurisdiction.

Given that Citibank's appellate brief of Citibank ignores the truth, looking back to the motion to dismiss we find that Citibank filed motion papers in the Eastern District of New York to dismiss - without being aware the case had been transferred to the Southern District. The Citibank motion papers finally delivered to Judge Patterson state that "Citibank will move at the United States Courthouse, Foley Square, New York, New York 10007, Courtroom 302, on Friday, October 21, 1994, at 4;00 p.m. or as soon thereafter as cousel may be heard: (i) for an Order, pursuant to Fed. R. Civ. P. 12(b) (1) dismissing plaintiff's action for lack of jurisdiciton over the subject matter; and for such other and further relief as the Court may deem just and proper (App. 6)." The judge merely accepted Citibank's proffer of proof as to jurisdicitonal amount in controversy Petitioner's questioned whether one need be robbed of over $50,000 in a N. Y. bank to qualify as to amount in controversy, when failure to pay $7,300 in real estate taxes or utility bills results in liens placed on real property. For example, the building known as 281 Park Street, Hackensack, has over seventy condominium units, and the sheriff sold over twenty of these units (assessed over $60,000 each) for $100 per unit, resulting in a loss of $1,200,000, far in excess of the $50,000 threshhold. Similar treatment threatened petitioner who is one block from 281 Park Street, and who operates a similar residential property.

Citibank was aware that its failure to comply with petitioner's oral discovery request resulted in the written request of October 19, 1994 (App. 67) [a request to turn-over the film of the August 8, 1994 robbery] prevented the filing of a more elaborate original complaint. Citibank delayed viewing the cassette film, required a police escort [to 450 West 33rd Street, N.Y.], and then made a series of appointments. It seeks relief from liability, now complaining of lack of damages from a "reputed" robbery. The original complaint itself states that "plaintiff was victimized by a well rehearsed grand larceny as a result of frequenting the bank anbd depositing over $50,000(Par. 3, App. 27). The original complaint speaks of plaintiff depositing "over $145,000 of funds from May 28, 1993 to August 8, 1994 (App. 15, Para. 3]. Petitioner filed the complaint on an expedited basis, proceeding by "Order to Show Cause" (App. 12), which order would require Citibank to reveal "the nature of its responsibility for the within described grand larceny so as to provide for a list of defendants and responsible parties who may be parties to this (original) Complaint. (App. 13, filed Aug. 19. 1994).

Judge Patterson's citing of the Sadler case, (Sadler v. Citibank N.A. 947 F.2d 642) is inapposite in that this pro se plaintiff demanded $1 billion in a complaint which was inarticulate and lacked specificity.

Citibank's reliance upon Wright and Miller's treatise for support of its position that the case at bar is not a proper case to allow amending of the complaint is erroneous. Wright and Miller present no cases which would lead to that conclusion. Citibank cites to cases such as the Twohy case above as standing for propositions favorablt to it. But Citibank discusses no case at sufficient length to prove its point. Petitioner's citing of cases is proper, and includes the facts of the case, as well as the law the court applies to the par

ticular facts. Petitioner discusses cases hereafter showing that the trial court should have allowed amending of the complaint.

Ward Electronics Service v. First Commercial Bank, 819 F.2d 496 (4th Cir. 1987), involved a government contractor filed suit against the defendant bank due to its dispersing of contract proceeds. The trial court granted a directed verdict on behalf of the defendant, and denied the contractor's motion to amend the complaint. Upon appeal, the court of appeals held that denial of the motion to amend was an abuse of discretion absent a showing the bank would have been prejudiced by the amendment. The court notes at p. 496 that "the district court denied the motion because 'the proposed amended complaint revised completely the theory upon which [Ward sought] to recover' and because Ward had already amended its complaint once. We hold that the district court abused its discretion in denying the motion and reverse."

This fact pattern is similar to the fact pattern in the case at bar. The bank (FCB) debited Ward $18,763.80. Ward filed suit April 4, 1986. Ward amended his complaint pursuant to a May 9, 1986 trial court order. On July 8, 1986 it sought to amend once again "one month before the...close... of...discovery."(p. 496), the second amended complaint seeking reeformation and recovery for breach of fiduciary duty, etc. On September 30, 1986 the action of the amended complaint was tried in a jury trial." Ward appealed after the judgement at trial. The court notes [497], "The singular issue raised by this appeal is whether the district court abused its discretion in denying Ward's motion to amend its Amended Complaint. Rule 15(a) of the Federal Rules of Civil Procedure provides that when a party seeks leave to amend a complaint 'leave shall be freely given when justice so requires.' Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222 (1962), mandates a liberal reading of

the rule's direction for 'free' allowance: motions to amend are to be granted in the absence of a 'declared reason' 'such as undue delay, bad faith or dilatory motion..., repreated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party..., futility of amendment, etc.' In Davis v. Piper Aircraft Corp., 615 F. 2d 606, 613 (6th Cir. 1980), we noted that under Foman a lack of prejudice would alone ordinarily warrant granting leave to amend and that mere delay absent any resulting prejudice or evidence of dilatoriness was not sufficient justification for denial." "The grounds offered by the district court here, a change in the theory of recovery and one prior amendment of the complaint, are not sufficient to justify denial of leave to amend under the principles of Foman and Davis...the fact that an amendment changes the plaintiff's theory of the case will not suffice as a reason for denial absent a showing of prejudice, bad faith, futility, or dilatoriness associated with the motion..."

"There was no finding here that Ward was acting in bad faith or in an effort to prolong the litigation unduly. Most important, there was no finding that FCB would have been in any way prejudiced by the amendment, nor could there have been. At the time Ward made its second motion to amend, the action was only three months old and discovery had been in progress for only one and one-half months. FCB had not yet deposed Ward and no trial date had been set. Further, the proposed amendment was based on information that was always in the possession of FCB..."(emphasis added)

[498] VACATED REVERSED REMANDED.

Just as in the Ward case, petitioner's case was only two months old when Judge Patterson dismissed (on October 31, 1994 - App. 7) the complaint (which he received September 1, 1994 from the Eastern District (App. 9). Petition

er moved to vacate the dismissal and amend by November 22, 1994 (App. 43), presenting the amended complaint alleging a civil RICO violation on the return date, Dec. 8, 1994 (App 24). Judge Patterson's order states merely "the Court does not have authority to order the filing of an amended complaint once judgment has been entered. Accordingly the motion is denied. So ordered. - December 12, 1994." Without some specific basis, the judgment must be set aside. The authority quoted in petitioner's brief is within the Fed R. Civ. P. 15 and Supreme Court decisions, Citibank, New York's largest bank, is identified at App. 15 in the amended complaint as operating under a federal charter of the Comptroller of the Currency with branches throughout the five boroughs of New York. The plaintiff deposited over $145,000 of funds in Citibank.

The Wilkinson case presents an instance in which a plaintiff amended to seek recovery under the RICO civil action statute. That case is Wilkinson v. Paine, Webber, Jackson & Curtis, Inc., 585 F. Supp. 23 (1983), involves an investor who brought an action against a brokerage firm and its registered representative alleging misrepresentatios of material facts concerning stock purchased (General Exploration Company (GEX). Plaintiff purchased 7000 shares of GEX stock on April 12, 1979 for $65,483.02, including commissions. Plaintiff sold her shares on December 3, 1979, and filed the complaint June, 1981. The court reasons that [at p.28], " Plaintiff seeks recovery from defendants pursuant to the civil treble damage provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. Section 1961 et seq.... [29] "the Court is of the view that plaintiff should be allowed to amend her complaint so as to properly allege her claims under RICO. Rule 15(a), Fed. R. Civ. P....Accordingly, as noted above, plaintiff is GRANTED leave of Court to amend her RICO claims. Plaintiff shall have thirty days to file her amendment to the complaint. Therefore, defendants' motion to dismiss plaintiff's RICO claims is hereby DENIED."

POINT THREE

PETTTIONER HAS ITS PRINCIPAL PLACE OF BUSINESS IN NEW JERSEY, AND IS A CITIZEN OF NEW JERSEY, WHILE CITIBANK HAS ITS PRINCIPAL PLACE OF BUSINESS IN NEW YORK AS REVEALED BY THE TREATISE, CITIBANK: 1812-1970.

Citibank's corporate existence began on June 16, 1812 in a building at 52 Wall Street, in New York, which had been occupied by the Bank of the United States prior to its charter not being renewed [Fn.1]. It moved its headquarters across the street on December 19, 1908 and remained there until 1961, in the building known as 55 Wall Street.[Fn. 2] In 1961, headquarters moved uptown to 399 Park Avenue, New York [Fn.3].

Citibank is a federal chartered bank registered with the Comptroller of the Currency in New York.

The New York Times editorial of September 21, 1929 noted that [Fn. 4] "the merger of the National City and Corn Exchange banks undoubtedly interests most people chiefly as giving America for the first time, the largest bank in the world... With this new merger at New York, $2,386,000,000 resources pass under a single management." On March 31, 1955, [National City] merged with the First National Bank. The merged institution was named the First National Ctiy Bank of New York [Fn. 5]." By 1966 Citibank had 164

Fn. 1. Citibank, 1812-1970, by Cleveland and Huertas,p. 54
Fn. 2. Id. p. 54.
Fn. 3. Id. Photo exhibit.
Fn. 4. Id p. 163.
Fn. 5. Id. p. 239.

domestic (New York) branches, putting it in first place for the first time in local branch banking, ahead of Chase Manhattan, Manufactuerer's Ganover, and Chemical Corn Exchange [Fn.6]."

The corporate disclosure statement provided by Citibank lists the subsidiaries of Citicorp which may be publicly held, namely, Banco Honduras, S.A., Central Holding Corp., Citibank Espana, S.A., Citibank Portugal, S.A., City Trust Banking Corp., Citibank Privatkunden A.B., (formerly KKB Bank, A.D.), Saudi American Bank, United Bank of Trinidad, Tobago Limited, and the Student Loan Corporation. This long list briefly suggests that Citicorp's diverse portfolio of banks results in presence existing in every part of the world, and diversity jurisdiction existing in none [Fn.7]. How Citicorp produced so widespread a banking empire when at the close of business on March 3, 1933 the bank owed the Federal Reserve $117 million, a sum in excess of its re-

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Fn. 6. Id. p. 272.

Fn. 7. Citibank (a.k.a. National City) lent the United States government $200,000 to finance the War of 1812 [Id.p.9]. In 1904, the U. S. Supreme Court found its railroad empire to be in violation of the Sherman Anti-Trust act [Id.p.40]. In 1916, Citibank opened branches in Russia, which it hoped would steal customers from German banking competitors, as it did in South America [p.99]. National City opened 22 branches in Cuba in 1919 [p.106]. National City opened branches in China and Japan, with oversight from the U. S. State Department [p.150]. In 1939, National City became an arm of the U. S. Treasury, an engine of war finance [p. 213]. In 1955, National City merged with First National Bank, the merged institution being named First National City Bank of New York, i.e. City Bank [Id.p.239].

quired reserves, deserves some consideration [Fn.8].

One would hope that Judge Patterson was not mislead by Citibank's far-flung banking empire into believing that petitioner and the bank were both citizens of New Jersey. Citibank is not registered as a banking institution with the Secretary of State of New Jersey.

Although Citibank may be a large bank, its banking practices on August 8, 1994 at Branch No. 11 in Manhattan display an cold indifference to the the robbery described. Citibank's briefs submitted to the court to date display a refusal to answer to complaint, and a refusal to believe that petitioner was harmed in excess of $50,000. Every case it cites is construed with that same bent [Fn.9]. Petitioner demands trial on the merits.

CONCLUSION

PETITIONER HAS SHOWN THAT CITIBANK FAILED TO ANSWER THE COMPLAINT, AND REFUSED TO TURN OVER THE PHOTOGRAPHS OF THE ROBBERY. PETITIONER PRODUCED A MOTION TO AMEND AND AMENDED COMPLAINT WITHIN ONE MONTH OF THE ISSUANCE OF SUMMONSES BY THE SOUTHERN DISTRICT. THE ENTRY OF JUDGMENT WITHIN WAS PREMATURE. PETITIONER PRAYS FOR THE REVERSAL OF THE DECISION OF THE TRIAL COURT.

Fn. 8. Id. p. 186.

Fn. 9. Citibank, by Leinsdorf and Etra, 1973, indicates that Citibank is New York's largest plaintiff; within two years Citibank filed over 25,000 lawsuits against patrons whose average income was below $6,000 per year in 1970. In 99% of the cases judgment was entered by default [p. 19].

App. 147

95-7060

CITIBANK's BRIEF FILED 4/13/95 IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SALVATORE MORETTI,
Plaintiff-Appellant

v.

CITIBANK, N.A., JOHN DOE, ET AL.,
Defendants-Appellees

On Appeal from the United States
District Court for the Southern
District of New York

BRIEF OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Citibank is a subsidiary of Citicorp., and the shares of Citicorp are publicly held. Citibank has no subsidiaries which have issued publicly held stock. The only subsidiaries of Citibcorp which may be publicly held in whole or in part are Banco Honduras, S.A., Central Holdings Corp., Citibank Espanca, S.A., Citibank Portugal, S. A., City Trust Bankng Corp., S.A., Citibank Privatkunden A. B. (formerly KKB Bank, A.D.), Saudi American Bank, Unitd Bank of Trinidad and Tobago Limited and The Student Loan Corportion.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION[1]

The United States District Court for the Southern District of New York dismissed plaintiff Salvatore Moretti's ("plaintiff") complaint pursuant to Fed. R. Civ. P. 12(b)(1), and subsequently denied his motion to alter or amend the judgment, because the court determined that it did not possess federal subject matter jurisdiction over plaintiff's causes of action.

The United States Court of Appeals for the Second Circuit has appellate jurisdiction over plaintiff's instant appeal pursuant to 28 U.S.C. Section 1291 as it is an appeal from a final decision of the district court.

[1]. Defendant Citibank, N.A. ("defendant") includes this seciton, as well as sections addressing (a) the issues presented for review, (b) the statement of the case, and (c) the statement of the standard of review because plaintiff failed to include these sections in his brief as is required by Fed. R. App. P. 28(a).

STATEMENT OF THE ISSUES PRESENTED

The issues presented for review by plaintiff are as follows:[2]

> (1) Did the district court abuse its discretion when it declined to alter, amend, or vacate its underlying judgment dismissing plaintiff's action for lack of subject matter jurisdiction?
>
> (2) Was the district court's underlying judgment dismissing plaintiff's action for lack of subject matter jurisdiction properly decided? [3]

[2]. Although plaintiff dedicates an entire section in his appellate brief (Point Five) to the transfer of his case from the Eastern District to the Southern District of New York, the propriety of Judge Amon's *sua sponte* transfer order is simply not at issue herein. The August 31, 1994 transfer order bears absolutely no relationship to the instant appeal by plaintiff Moretti.

[3]. Plaintiff has only noticed an appeal from the district court's December 12, 1994 order which (a) denied plaintiff's motion to alter or amend the underlying judgment, and (b) denied plaintiff's motion for leave to file an amended complaint. Although plaintiff preserved his right to appeal from the underlying judgment based on his timely-served rule 59(e) motion (see Fed. R. App. P 4(a)(4), he has expressly limited his appeal to the "reconsideration" order. Notwithstanding the foregoing, it is

[3. cont.] well-settled that an appeal from a timely Rule 59(e) motion may serve as notice of appeal from the underlying judgment in cases where the appellant's intent to appeal from that judgment is clear. *See Wheatley v. Beeter*, 637 F.2d 637 F.2d 863, 864 n.1 (3d Cir. 1980); *San Juan Dupont Plaza Hotel Fire Litigation v. American National Fire Ins. Co.*, 45 F. 3d 564, 567 (1st Cir. 1995). Although plaintiff's intent in this regard cannot be inferred from his convoluted appellate brief, because of his *pro se* status, defendant will, to the extent necessary, address the propriety of the underlying judgment and will respond to plaintiff's relevant arguments with respect thereto.

(3) Did the district court abuse its discretion when it determined that it lacked the authority to order the filing of an amended complaint pursuant to Fed. R. Civ. P. 15(a) once judgment dismissing the case in its entirety had been entered?

STATEMENT OF THE CASE

In August 1994 plaintiff fild a complaint in federal district court alleging that defendant should be held liable beaucse he was the victim of a "grand larceny" that allegedly took place while he waited on line at a Manhattan Citibank branch. *See* Plaintiff's Appendix ("App.") at 25.[4]

[4] Defendant respectfully urges the Court to exercise caution in reviewing plaintiff's appendix. Plantiff has provided this Court with defendant's papers in what appear to be a re-printed form containing spelling and typographical errors that were not present in the actual documents filed below. Plaintiff failed to serve on the

appellee a description of the parts of the record which he intended to include in his appendix as is required by Fed. R. App. P. 30(b). Moreover, in violation of Fed. R. App. P. 30(a), the appendix includes various briefs and memoranda filed with the district court that have no independent relevance to this appeal. If it does choose to consider the briefs filed below, the Court is respectfully urged to review defendant's reply Moemorandum of Law, which was not made a part of plaintiff's appendix.

Although somewhat confused, plaintiff's complaint seems to allege that, on August 8, 1994 he was robbed of $7,336.00 while he waited to make his customary monthly deposit inside Citibank Branch No. 11, 415 Broadway, New York, New York. App. at 29. While the alleged crime was perpetrated by an unknown robber, plaintiff sued defendabnt based on its alleged lack of security at the bank, which "was the proximate cause of the grand larceny." App. at 29. In total, including what appears to be substantial duplication, plaintiff's claim for money damages in the District Court amounted to $17,336.00.

Plainitff initially filed this action in the United States District Court of New York and based federal jurisdiction on diversity of citizenship. App. at 15. On or about August 31, 1994, the Honorable Carol Bagley Amon transferred the case, *sua sponte*, to the Southern District of New York pursuant to 28 U.S.C. Section 1391(b) and 1406(a). App. at 9. On or about October 6, 1994, defendant moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). App. at 6. On or about November 1, 1994, after the motion was fully briefed by the parties, the Honorable Robert P. Patterson issued an Order granting defendant's motion to dismiss and closing the case. On November 21, 1994, judgment was entered dismissing the action in its entirety. App. at 8.

On or about November 23, 1994, plaintiff served a motion for leave to file an amended complaint and to amend or alter the order dismissing the first complaint. App. at 32. Defendant opposed plaintiff's motion by letter brief dated December 1, 1994. App. at 72. After plaintiff's December 4, 1994 reply and his *ex parte* appearance at Judge Patterson's chambers on December 8, 1994, the Judge, by decision dated December 12, 1994, denied plaintiff's motion in its entirety. On or about January 9, 1995, plaintiff noticed this appeal of the December 12, 1994 decision. App. at 1.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review on an appeal from the denial of a Fed. R. Civ. P. 59(e) or 60(b) motion is abuse of discretion. *Branum v. Clark*, 927 F. 2d 698 (2d Cir. 1991) (abuse of discretion review of denial of untimely filed 59(e) motion); *Moreno-Ortiz v. United States*, 983 F.2d 15, 17 (2d Cir. 1993) (abuse of discretion review of denial of motion to reconsider a judgment); *CTC Imports & Exports v. Nigerian Petroleum Corporation*, 951 F.2d 573 (3d Cir. 1991) (abuse of discretion review of denial of 59(e) motion). Under this standard, the district court's decision and decision-making process need only be reasonable. *United States v. Fernandez*, 877 F.2d 1138, 1146 (2d Cir. 1989); *Midland West Corp. v. FDIC*, 911 F.2d 1141 (5th Cir. 1991).

SUMMARY OF ARGUMENT

The district court properly denied plaintiff's motion to set aside the dismissal of his action. Plantiff was not entitled to have the dismissal judgment altered or ameneded pursuant to Fed. R. Civ. P. 59(e) because he was unnable to show that the district court overlooked

POINT III

THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

It is well-settled in this Circuit that "once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991) (quoting *Cooper v. Shumway*, 780 F.2d 27, 19 10th Cir 1985)); *see also FDIC v. Chizner*, 110 F.R.D. 114 (E.D.N.Y. 1986) (entry of judment after defendant's summary judgment motion was granted required plaintiff to move for vacation of the judgment before seeking leave to amend the complaint). Moreover, unless there is a valid basis to vacate the entered judgment (i.e., where the court overlooked matters or controlling decision), it would be contradictory to enterain a motion to amend. *Ntional Petrochemical Co. of Iran*, 930 F.2d at 245. "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employEd in a way that is contrary to the philosophy favoring finality of judGments and the expeditious termination of litigation." 6 C. Wright & A. Miller, Federal Practice and Procedure Section 1489, at 694 (1990); *see also Mitsubishi Aircraft Int'l v. Brady*, 780 F.2d 1199, 1203 (5th Cir. 1986) ("by the time the motion to amend was filed, there was no longer existent a claim to be amended, since summary judgnment was already granted"); *Twohy v. First National Bank*, 758 F.2d 1185, 1196 (7th Cir. 1985) (several courts have recognized that justice may require something less in post-judgment situations than in pre-judgment situation under Rule 15(a)). In the

instant case, judgment was entered on November 21, 1994, and plaintiff served his Rule 15 (a) motion on November 23, 1994. The district court, in the exercise of its sound discretion, declined to vacate the underlying dismissal judgment. Thus, in accordance with *National Petrochemical*, the court properly held that it had "no authority to order the filing of an amnded complaint once judgment has been entered." App. at 5.

In Point One of his appellate brief, plaintiff argues that, pursuant to Fed. R. Civ. P. 15(a), and *Foman v. Davis*, 371 U.S. 178 (1962), the district court should have vacated the underlyng judgment in order to allow plaintiff leave to amend his complaint. While it is true that "it might be appropriate in a proper case to take into account the nature of the propsoed amendment in deciding whether to vacate the previously entered judgment, " *National Petrochemical Co. of Iran*, 930 F.2d at 245, the case at bar is simply not a "proper case."

In *Foman*, the United States Supreme Court held that if the underlying facts or circumstances may be a proper subject of relief, a plaintiff "ought to be afforded an opportunity to test his claim on the merits." *Id.* at 182. Plaintiff was given a number of opportunities to test the jurisdictional merits of his claim. He began by alleging diversity of citizenship in his complaint. After defendant identified the insufficiency of this basis in its initial set of moving papers, plaintiff, in his oppostion brief, alleged jurisdiction under the Federal Bank Robbert Act. However, the district court rejected both of these grounds as proper basis to confer subject matter jurisdiction. Undaunted, folowing entry of a judgment against him, plaintiff returned with yet a third jurisdictional theory -- namely, federal question jurisdiction

under the RICO Statute. [7].ls 1

This is asserted in the amended complaint, which the district court held it lacked authority to order filed.

Defendant has suffered the burden of demonstrating in each instance the lack of subject matter jurisdiction under plaintiff's thories. Fairness dictates that at some point there be an end to litigation. Having tried and failed on two separate occasions, plaintiff was properly precluded by the district court from making yet another attempt to "hitch on" to a viable jurisdictional basis. Allowing such conduct "would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgment and the expeditious termination of litigation." *National Petrochemical*, 930 F.2d at 245 (quoting 6 C. Wright & A. Miller, Federal Practice and Procedure Section 1489, at 694 (1990). Accordingly, the district court's decision declining to vacate the underlying dismissal judgment and allowing for amendment should be upheld by this Court.[8].ls 1

[7]. Contining in the same fashion, in Point III of his appellate brief plaintiff for the first time asserts still a fourth meritless basis of jurisdiction -- namely, negligence.

[8]. The Supreme Court in *Foman* recognized that where an amendment would prove futile, the court may, in its sound discretion, decline to vacate a judgment so as to allow for the amended pleading. *id.* at 182. While the district court below did not reach this analysis with respect to plaintiff's amended complaint, scrutiny of the proposed pleading reveals its failure to sufficiently allege a viable RICO claim.

[8. cont.]

Among other things, defendant is alleged to be both the "enterprise" and a "person" -- whereas this circuit requires that they be separate. *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985), cert. denied, 474 U.S. 1058, 106 S.Ct.800, 88 L.Ed.2d. 776 (1986). There is serious question whether plaintiff has adequately alleged, at least with the requisite Rule 9(b) particularity, any predicte offenses. *See McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992) (allegations of predicate mail and wire fraud acts must be made with the particularity required by Rule 9(b)). The amended pleading does not allege a "pattern of racketeerng acticity" where the racheteering predictes are related to each other or to the affairs of the enterprise, and amount to or pose a threat of contining criminl activity. *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct 2893, 106 L.Ed.2d 195, 208 (1989). There is also no allegation of RICO injury proximately caused by a pattern of racheteering activity. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990).

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court deny plaintiff's appeal in all respects and affirm the decision of the Court below.

Dated: New York, New York. April 13, 1995

Respectfully submitted, SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN, & GROSS, P.A., By: (s) Joseph L. Buckley, Attorney for Defendant-Appellee, Citibank, N.A., 712 Fifth Avenue - 20th Floor, New York, New York 10019